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IN THE

# Supreme Court of the United States

Young I. Kim and
Delta Savings Bank,

*Petitioners*,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

Timothy J. Gorry
Jon Jamison-Hill
Gorry, Meyer & Rudd, L.L.P.
2029 Century Park East
Suite 400
Los Angeles, CA 90067
(310) 277-5967

Thomas C. Goldstein
Amy Howe
Thomas C. Goldstein, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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## QUESTION PRESENTED

This is a suit brought by Petitioners against the United States under the Federal Tort Claims Act, which (subject to various exceptions not relevant here) waives the federal government's sovereign immunity from suit for state law tort claims. Petitioners allege that the United States is liable on a state law "negligence *per se*" theory because federal officials violated the duty to prevent race-based conspiracies established by federal law (see 42 U.S.C. § 1986). The Ninth Circuit accepted that California law would adopt this federal duty. But it nonetheless held that an FTCA claim may not rest on a state law "cause of action which relies solely on federal law as the source of the [defendant's] duty" unless the state has independently adopted an "analogous" duty.

The Question Presented is:

Is a claim under the Federal Tort Claims Act barred on a state law tort "cause of action which relies solely on federal law as the source of the [defendant's] duty [of care]" when state law adopts the duty from federal law but does not independently recognize an "analogous" duty?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are identified in the caption.

## RULE 29.6 STATEMENT

Petitioner Delta Savings Bank has no parent corporation. No publicly held company owns ten percent or more of Petitioner Delta Savings Bank's stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Young I. Kim and Delta Savings Bank respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-16a) (per B. Fletcher, J., joined by Thomas and Wardlaw, JJ.) is published at 265 F.3d 1017. The District Court's opinions (*id.* 17a-51a) are unpublished.

## RELEVANT STATUTORY PROVISIONS

The Federal Tort Claims Act provides in relevant part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The statute further provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

28 U.S.C. § 2674.

42 U.S.C. § 1986 provides in relevant part:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in [42 U.S.C. § 1985], are about to be committed, and having power to prevent or aid in preventing the

> commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case * * *.

California Evidence Code § 669(a) provides:

> (a) The failure of a person to exercise due care is presumed if:
>
> (1) He violated a statute, ordinance, or regulation of a public entity;
>
> (2) The violation proximately caused death or injury to person or property;
>
> (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
>
> (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

## JURISDICTION

The court of appeals entered its judgment on July 12, 2001. Justice O'Connor subsequently extended the time to file this Petition to and including November 9, 2001. Applic. No. A01-306. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATEMENT

This case presents a fundamental and recurring question regarding the scope of the liability of the United States under the Federal Tort Claims Act ("FTCA"). Subject to various exceptions not relevant here, the FTCA waives the federal government's sovereign immunity from suit "under circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The statute thus recognizes claims under state law, *including* state law claims that import duties created by federal law. For example, in *United States* v. *Muniz*, this Court explicitly and unanimously held that federal prisoners properly stated a state law negligence claim against the United States under the FTCA when "the duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule." 374 U.S. 150, 164-65 (1963).

Certiorari is warranted in this case because the courts of appeals have flatly refused to follow this Court's decisions, and furthermore because the question presented has surpassing importance. The courts of appeals have uniformly held that, under the FTCA, a plaintiff may not rely on a state law claim that imports federal law duties but rather must identify a separate state law duty that is "analogous" to the federal duty. In this case, the Ninth Circuit held that Petitioners may not sue the United States on a negligence *per se* claim that rested on the federal law duty, established by 42 U.S.C. § 1986, to prevent race-based conspiracies. This interpretation of the FTCA, unless reversed, substantially undermines Congress' intent to waive the federal government's sovereign immunity from suit in circumstances in which an individual would be liable under state law.

1. This case arises from allegations that federal officials failed to prevent a race-based conspiracy against Petitioners by employees of the federal Office of Thrift Supervision ("OTS").

In 1989, Petitioner Young I. Kim ("Kim") and a number of other individuals of Asian ancestry invested millions of dollars in, and assumed control of, Petitioner Delta Savings Bank ("Delta"). Petitioner Kim was named Delta's President and assumed responsibility for its day-to-day operations. Prior to that time, the bank had been reporting losses of

approximately $100,000 per month and its operations were restricted by OTS.

As subsequently recounted by the Ninth Circuit in a parallel action, "Delta began to prosper almost immediately after the new owners and managers took over." *Kim* v. *Office of Thrift Supervision*, 40 F.3d 1050, 1051 (1994). In recognition of the bank's improved position, OTS itself withdrew the restrictions on Delta's operations and awarded it an improved rating. *Id.* By late 1991, "Delta's financial position had improved to the point where it had tangible capital of $3.5 million and a capital ratio of 5.4%, *i.e.*, nearly a 30% improvement over the previous year's ratio of 4.2%" and well above the required 1.5% ratio. *Id.* at 1051-52.

Despite this remarkable success, during 1991, OTS's oversight and investigation of Delta became progressively more aggressive in a manner that led the bank to conclude that it was the subject of a race-based conspiracy by certain OTS employees. Delta filed a formal complaint with OTS. Delta's Board also authorized the bank to sue the government on the basis of the conspiracy.

In November 1991, the federal government's recognition of Delta's exceptional success "dramatically changed," as OTS charged Kim and other directors with banking violations, ordered Kim removed from office, and summarily seized Delta's assets. See *Kim* v. *Office of Thrift Supervision*, 40 F.3d at 1052. OTS placed Delta in a conservatorship and, soon thereafter, under receivership by the Resolution Trust Corporation. *Id.* Kim contested the OTS order, and an ALJ issued "extensive findings of fact and conclusions of law," concluding that although Delta's directors had engaged in "some unsafe and unsound practices," Kim should not be sanctioned in any respect or required to pay restitution. *Id.* OTS sought further review before its own Acting Director, who agreed that restitution was not warranted but issued an Order that permanently prohibited Kim from working in the American banking industry. *Id.*

The Ninth Circuit threw out OTS's prohibition order as unsupported by any evidence of any intent by Kim to engage in wrongdoing. Chiding OTS for its "vehement use of such colorful words as 'egregious' to describe Kim's conduct," the court of appeals explained that the record in reality revealed "only that Kim was one of several officers and directors who approved a few questionable loans – from none of which he personally profited – out of literally hundreds of g od loans, and that a few relatively minor and technical violations of certain banking regulations occurred while Kim was at Delta's helm." 40 F.3d at 1055. Although the court agreed that these minor and technical violations could have justified placing the bank in receivership – a question not before the court – "Kim's conduct in *no way* involved *anything approaching* the level of culpability required" to impose the OTS's prohibition order. *Id.* (emphasis added).

2. In this action, the Ninth Circuit held that a claim under the Federal Tort Claims Act cannot rest on a state law theory that relies on a duty established by federal law unless the state independently recognizes an "analogous" duty. As Respondent noted below (Resp. C.A. Br. 36), every other circuit has adopted the same rule.

a. Petitioners brought this suit against the United States for failing to prevent a race-based conspiracy by various OTS employees that manifested itself in OTS's discriminatory treatment of Kim and Delta. Kim sought relief individually and on behalf of Delta. The complaint asserted a claim under the Federal Tort Claims Act, which (subject to various exceptions) waives the federal government's immunity for state law tort claims. 28 U.S.C. §§ 1346(b), 2674; *United States* v. *Muniz*, 374 U.S. 150 (1963). Subject to exceptions not relevant here, the FTCA renders the federal government liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

Petitioners specifically alleged that the United States was liable for "negligence *per se*," a claim recognized by every state as a means to prove negligence on the basis of the defendant's violation of a statute. In California, where this case arises, a plaintiff must establish that the defendant violated the statute and thereby proximately caused the plaintiff's injury. Cal. Evid. Code. § 669(a)(1)-(2). California also looks to the statutory violation to establish the defendant's duty to the plaintiff: the plaintiff must prove that the injury was of the type the statute was designed to prevent, and furthermore that he is a member of the class of persons the statute was designed to protect. *Id.* § 669(a)(3)-(4). A defendant may rebut the presumption of negligence by showing that he acted with reasonable care. *Id.* § 669(b)(1). See generally, *e.g.*, *Vesely* v. *Sager*, 5 Cal. 3d 153, 164 (1971) (under negligence *per se* statute, defendant's "duty of care" is "found in a legislative enactment"); *Elsworth* v. *Beech Aircraft Corp.*, 37 Cal. 3d 540 (1984) (sustaining negligence *per se* action based on failure to comply with Federal Aviation Administration regulations).[1]

In this case, Petitioners allege that federal officials violated the duty that 42 U.S.C. § 1986 ("Section 1986") imposes on all persons to act to prevent race-based conspiracies. Section 1986 specifically renders liable any person who has knowledge of a race-based conspiracy

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[1] This is the view of California law accepted by the lower courts in this case. Some lower court authority in California takes the view that a statutory violation that establishes negligence *per se* does not necessarily also establish the defendant's "duty of care" to the plaintiff. But the question whether California deems a "duty of care" to be intrinsic in every statutory violation is immaterial in this case – a "duty of care" is explicit in Section 1986, and neither the district court nor the Ninth Circuit doubted that California would import such a "duty" from federal law. See Pet. App. 14a (court of appeals' opinion; Petitioners' claim "relies solely on federal law as the source of duty"); *id.* 30a (district court opinion; "The duty in this case arises under federal law, i.e. § 1986 * * *."). It thus makes no difference whether that duty is imported into California law *via* the negligence *per se* doctrine or instead is simply adopted by state law.

actionable under 42 U.S.C. § 1985 and, "having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so." 42 U.S.C. § 1986. Petitioners thus allege that federal officials committed negligence *per se* under California law when, in violation of Section 1986, they failed to protect Delta and Kim from the race-based conspiracy of OTS employees.

b. The district court initially held that Petitioners' claim was actionable under the FTCA. Pet. App. 17a-31a. According to the court:

> Section 1986 creates a primary statutory duty for all persons who have knowledge of, and the power to prevent, race-based conspiracies to actually prevent such conspiracies from taking form. Under the rubric of the FTCA, § 1986 creates a duty under California negligence *per se* law binding any state citizen to prevent race-based conspiracies, and therefore, that duty also insures to the federal government. Thus, Plaintiffs state a valid claim under the FTCA based on the breach of a federal duty incorporated as part of California negligence law.

*Id.* 21a.

The district court rejected Respondent's argument that Petitioners' suit was barred because, although their negligence *per se* claim arose under California law, the *duty* element of the claim was imported from federal law. "The government's contention that there is no state law analogous to § 1986 misses the point; the relevant inquiry is whether § 1986 creates a duty that would bind a private individual under the state's negligence *per se* laws." *Id.* 24a. Under this analysis, "§ 1986 serves merely as the *source* of the statutory duty that allows Plaintiffs to bring suit against the United States; however, it is California's negligence *per se* law that supplies the analogous state law claim required by the FTCA." *Id.* (emphasis in original).

c. Upon the retirement of the original district judge, the case was reassigned to a new judge, who reached the opposite conclusion and dismissed Petitioners' complaint. Pet. App. 40a-51a. The district court did not doubt that Petitioners could state a negligence *per se* claim under state law. Rather, the court held that such a claim was not actionable under the FTCA because "the duty element of a tort must rest on state law in order for a court to have jurisdiction under the FTCA." *Id.* 48a.

In reaching this conclusion, the district court relied on the Ninth Circuit's decisions in *United Scottish Insurance Co.* v. *United States*, 614 F.2d 188 (1979), *after remand*, 692 F.2d 1209 (1982), *rev'd on other grounds*, 467 U.S. 797 (1984), and *Lutz* v. *United States*, 685 F.2d 1178 (1982). In *United Scottish Insurance*, the plaintiffs sued the United States under the FTCA alleging that government officials had violated federal regulations governing aircraft inspections. The court held that the FTCA does not permit plaintiffs to allege state law negligence *per se* claims that rest on federal statutory duties. The Ninth Circuit recognized that this Court had held in *United States* v. *Muniz*, 374 U.S. 150, 164-65 (1963), that federal prisoners could state a FTCA claim under which "the duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule." But the Ninth Circuit refused to read *Muniz* as relying on the duty of care established by federal law: "We believe that this statement should be read as finding a duty inhering in the nature of the custodial relationship, which is established in part by the federal statute and in part by the activity itself. Under this interpretation, the duty stems from state tort law rather than directly from the statute." *United Scottish Ins. Co.*, 614 F.2d at 198. Relying instead on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), the Ninth Circuit held that a plaintiff may proceed only if the state has independently recognized an analogous duty. 614 F.2d at 193-94.

On the basis of *United Scottish Insurance*, the Ninth Circuit in *Lutz* subsequently held that a plaintiff could bring an FTCA claim on a negligence *per se* theory for the defendant's failure to control his pet as required by an Air Force base regulation because the state recognized an analogous duty for owners to control their pets. 685 F.2d at 1184.

In this case, the second district judge concluded that *United Scottish Insurance* and *Lutz* precluded Petitioners from bringing an FTCA claim because California's negligence *per se* doctrine looks to a "duty" that originates in federal, rather than state, law. "Although plaintiff argues that California's negligence per se statute incorporates § 1986, this duty is based in federal law and therefore is not actionable under the FTCA. Only state law, not federal law such as § 1986, can serve as the source of substantive liability under the FTCA." Pet. App. 49a (citations omitted).

b. On Petitioners' appeal, the Ninth Circuit affirmed. Pet. App. 1a-16a. The court of appeals "agree[d] with the district court" that under *Lutz* and *United Scottish Insurance* "a duty must be identified, and this duty cannot spring from a federal law. The duty must arise from state statutory or decisional law, and must impose on the defendants a duty to refrain from committing the sort of wrong alleged here." *Id.* 13a. Thus, according to the Ninth Circuit, Petitioners could not state a claim even "if the forum state recognizes a claim for negligence per se for the violation of a federal statute." *Id.* 12a. The court of appeals continued:

> Plaintiffs argue that a state law negligence per se action can be premised on the duty arising from the federal statute, 42 U.S.C. § 1986. Thus, they argue that a FTCA cause of action can be premised on a California negligence per se cause of action which is premised on the violation of the federal duty under § 1986. We disagree. This is an attempt to do an "end around" the local law requirements of the

> FTCA. If FTCA liability cannot be premised directly on alleged violations of § 1986, then neither can it be premised on a negligence per se cause of action which relies solely on federal law as the source of the duty.

*Id.* 13a-14a.

On this view, "'The pertinent inquiry is whether the duties set forth in the federal law are analogous to those imposed under local tort law.'" *Id.* 13a (quoting *Art Metal-U.S.A.* v. *United States*, 753 F.2d 1151, 1158 (CADC 1985) (citing, in turn, *Indian Towing*, *supra*)). The Ninth Circuit found no independent state duty analogous to that imposed by Section 1986. See generally *id.* 11a-12a.[2] Accordingly, it concluded that "[a]lthough FTCA violations can be premised on state negligence per se causes of action, the plaintiffs in this case have not shown that the United States was bound by a duty under California law to support such a theory." *Id.* (citing *Lutz* v. *United States*, *supra*).[3]

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[2] The court of appeals thus rejected Petitioners' reliance on analogous state statutes that demonstrate California's commitment to combating racial conspiracies. See *id.* The court specifically did not doubt "that the 'legislative scheme underlying [these statutes] generally forbids the violation of another's civil rights under California law'" (*id.* (quoting Petr's C.A. Br.) (alterations omitted)); it simply found that fact irrelevant. *Id.* 11a.

[3] The Ninth Circuit did not adopt Respondent's contention (Resp. C.A. Br. 40) that California generally recognizes claims of negligence *per se* only for violations of "safety" statutes and that Petitioners' claim was therefore invalid as a matter of state law. It is fair to say, however, that the panel doubted that Petitioners could make out a state law claim for negligence *per se*, although it limited itself to a one-sentence criticism of Petitioners' briefing rather than actually deciding the issue. "[E]ven if we did allow such an 'end around,' plaintiffs have not cited any California cases which suggest that negligence per se actions can be premised on alleged violations of any of the federal civil rights statutes." Pet. App. 14a.

The fact that Petitioners did not fully brief this question below is entirely understandable, given that the Ninth Circuit has held such claims

## REASONS FOR GRANTING THE WRIT

The decision below conflicts with this Court's holding that the FTCA waives the federal government's sovereign immunity from suit on a state law tort claim that imports a federal law duty. That holding is mandated by the plain text of the FTCA, under which the only relevant inquiry is whether "a private person * * * would be liable" under state

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to be barred as a matter of law since its 1977 decision in *United Scottish Insurance*, *supra*, and given that the district court dismissed Petitioners' complaint on that ground. In any event, there is no merit to Respondent's contention that California would not recognize a claim for negligence *per se* on the basis of a violation of 42 U.S.C. § 1986. Section 1986 operates in a manner akin to a "safety" statute because it creates a duty on the part of all individuals, including federal officials, to protect victims from racial conspiracies. Cf. *Alejo* v. *City of Alhambra*, 75 Cal. App. 4th 1180, 1885 (App. 1999) (holding that, although California does not recognize a general duty to come to the aid of another, such a duty may be imposed by statute and accordingly may be actionable on a negligence *per se* theory). In any event, Respondent's characterization of California negligence *per se* law is erroneous, as such a claim is not restricted to the defendant's violation of a "safety" statute. *E.g.*, *Christensen* v. *Superior Court*, 54 Cal. 3d 868, 893 (1991) (statute prohibiting unauthorized removal of body part with intent to sell, which is intended not merely to protect health "but also to prevent invasion of the religious, moral, and esthetic sensibilities of the survivors"); *Nowlon* v. *Koram Ins. Ctr.*, 1 Cal. App. 4th 1437, 1441 (App. 1991) (statute prohibiting sale of insurance by unlicensed companies); *Transamerica Title Ins. Co.* v. *Green*, 11 Cal. App. 3d 693, 702 (App. 1970) (statute requiring notary to verify identity of signatories). Further support for the conclusion that California's negligence *per se* doctrine is not limited to "safety statutes" is found in cases decided under California Government Code § 815.6, which holds government entities liable for negligence *per se*. See *Lehto* v. *City of Oxnard*, 171 Cal. App. 3d 285, 292 (App. 1985) (explaining that Section 815.6 applies negligence *per se* to the government). California courts do not limit liability under this provision to violations of "safety statutes." *E.g.*, *Walt Rankin & Assocs.* v. *City of Murrieta*, 84 Cal. App. 4th 605, 624 (App. 2000) (statute governing verification of sureties); *Davila* v. *County of Los Angeles*, 50 Cal. App. 4th 137, 142 (App. 1996) (statute requiring coroner to make reasonable attempt to locate decedent's next of kin); *Bradford* v. *State*, 36 Cal. App. 3d 16, 19, 21 (App. 1973) (statute requiring government to record dismissal of defendant's criminal conviction).

law. 28 U.S.C. § 1346(b). See also 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."). The FTCA thus leaves no room for a separate inquiry, applicable only to claims against the federal government, whether the duty element of the plaintiff's claim originally arises from state, as opposed to federal, law.

This Court thus squarely held in *United States* v. *Muniz*, 374 U.S. 150 (1963), and confirmed in *Logue* v. *United States*, 412 U.S. 521, 528-29 (1973), that an FTCA claim may rest on a duty established by federal law. *Muniz* sustained suits by federal prisoners under which "the *duty of care* owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule." 374 U.S. at 164-65 (emphasis added).

Nothing in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), supports the decision below. To the contrary, *Indian Towing* establishes that, because a claim by Petitioners against a private defendant "under like circumstances" (28 U.S.C. § 2674) would proceed on a negligence *per se* theory, the same cause of action is available against the federal government under the FTCA.

Only this Court can return the FTCA to its proper construction. The courts of appeals have uniformly defied this Court's holding that the FTCA waives the federal government's sovereign immunity from suit on state law tort claims that adopt federal law duties. The importance of the question presented is beyond dispute, as it is dispositive of whether the United States may be held liable for violations of myriad duties established by federal law. Moreover, the decision below not only directly encompasses claims in every state under the negligence *per se* doctrine, but also logically extends to the "duty" element of traditional negligence claims as well.

Certiorari accordingly should be granted.

## I. The Decision Below Conflicts With This Court's Precedents.

a. This Court has repeatedly held that the FTCA waives the federal government's sovereign immunity from suit for state law tort claims without regard to whether the "duty" element of those claims arises originally from state, as opposed to federal, law. It thus makes no difference that a plaintiff's claim rests on a duty that the state has imported from federal law but not adopted independently. In considering Petitioners' negligence *per se* claim, the California courts would look to the duty to prevent race-based conspiracies created by 42 U.S.C. § 1986. As the first district judge to decide this case correctly reasoned, "§ 1986 serves merely as the *source* of the statutory duty that allows Plaintiffs to bring suit against the United States; however, it is California's negligence *per se* law that supplies the analogous state law claim required by the FTCA." Pet. App. 24a (emphasis in original). Like every other circuit, however, the Ninth Circuit held as a matter of law that such claim may not be brought under the FTCA because it "relies solely on federal law as the source of the [United States'] duty." *Id.* 14a.

This Court's contrary holding, under which Petitioners have stated a claim, is mandated by the plain text of the FTCA. The statute waives the federal government's sovereign immunity when "a private person * * * would be liable" under state law. 28 U.S.C. § 1346(b). The statute thus asks simply, and exclusively, whether the plaintiff can state a claim under state law. Nothing in the FTCA requires states to re-enact the full body of federal law duties into their statutory codes in order to recognize those duties as the basis for a claim of negligence. To the contrary, this Court has explicitly held that the federal courts must apply "the *whole law* of the State where the act or omission occurred" (*Richards* v. *United*

*States*, 369 U.S. 1, 11 (1962)), which plainly includes the duties that state law incorporates from federal law.[4]

Indeed, even the Ninth Circuit and Respondent seem to recognize that the FTCA permits claims that look back to federal law in some respect. Thus, there is no dispute that federal law may provide the standard of care for a state law claim under the FTCA. The federal government similarly maintains that the FTCA does recognize privileges that state law would import from federal law. *E.g.*, *Rhoden* v. *United States*, 55 F.3d 428, 431 (CA9 1995). There is no basis in the FTCA for concluding that state law may not similarly look to federal law to identify the defendant's duty of care.

At bottom, the point of the FTCA is to "treat the United States as an individual would be treated under like circumstances." *Richards*, 369 U.S. at 12. See 28 U.S.C. § 2674 ("The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *."). The decision below, by contrast, applies a more rigorous standard for evaluating negligence *per se* claims against the federal government than the California courts would apply in a case brought against a private defendant. Indeed, directly contrary to Congress' intent to make the United States generally liable in tort on equal terms with private individuals, the effect of the decision below is to provide that *only* federal officials are immune for violating the duties established by Section 1986.

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[4] That the "whole law of the state" includes federal duties incorporated by state law is also apparent from *Hess* v. *United States*, 361 U.S. 314 (1960), in which the plaintiff's FTCA claim arose from a death on a dam. This Court held that the FTCA claim was governed by the duties established by *federal* maritime law because the state would apply federal maritime law in "an action between private parties." 361 U.S. at 318-19 & n.7. (As it happened, the federal maritime duties ultimately required referring *back* to state law.) By contrast, on the Ninth Circuit's view in this case, the claim in *Hess* would have been invalidated because it was dependent on a duty defined in the first instance by federal, rather than state, law.

This "plain language" interpretation of the FTCA is also confirmed by the FTCA's "discretionary function" exemption, which clearly contemplates that FTCA claims will be brought based on asserted violations of federal law duties. The exemption immunizes the government from any suit "based upon [a federal agency's or employee's] exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. § 2680(a). Given the express statutory reference to a federal "duty," cases under the exception frequently involve the federal government's compliance with duties owed by the United States to the plaintiff *under federal law*. Because Petitioners' claim is not precluded by the discretionary function exemption (or any other exception to the FTCA), Petitioners properly may invoke a federal law duty imported by California law. See, *e.g.*, *Berkovitz* v. *United States*, 486 U.S. 531 (1988) (holding that plaintiffs' claim that United States violated "federal statute and accompanying regulations in issuing a license" for polio vaccine and furthermore "violated federal regulations and policy in approving the release of the particular lot" of vaccine in question did not fall within discretionary function exemption).

b. Based on the statute's plain text and Congress' obvious intent, this Court has held that the FTCA waives the federal government's immunity for state law tort claims that rest on violations of duties established by federal law. Thus, in *United States* v. *Muniz*, 374 U.S. 150 (1963), federal prisoners sued the United States under the FTCA based on the negligence of prison officials. For example, one plaintiff alleged that he had been provided inadequate medical care while another alleged that prison officials had failed to protect him from assault. The plaintiffs' negligence claim rested on the Bureau of Prisons' failure to comply with its duty, established by 18 U.S.C. § 4042, to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the

United States, or held as witnesses or otherwise." This Court unanimously held that the plaintiffs had stated a claim.

Initially, the Court rejected the United States' argument that prisoner suits should be broadly prohibited in order to limit the scope of the government's liability. "Congress used neither intricate nor restrictive language in waiving the Government's sovereign immunity." 374 U.S. at 152. Under the plain terms of the FTCA, the relevant inquiry is simply "whether a private individual under like circumstances would be liable under state law." *Id.* at 153. And, while it was true that "an analogous form of liability exists" in those states that "have allowed prisoners to recover from their jailers for negligently caused injuries," the same result would obtain even if that were not true because the FTCA "extends to novel and unprecedented forms of liability as well." *Id.* at 159.

The Court also unanimously rejected the argument that prisoner suits were not actionable because many states, unlike the federal government, do not recognize a tort duty of care owed by jailers to their prisoners. In a passage critical here, the Court explained that "the duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule" (374 U.S. at 164-65). It thus made absolutely no difference that, for example, Massachusetts courts had held that "the master of a house of correction has *no duty of care* toward his prisoners which would make him liable for his negligence." *Id.* (citing *O'Hare* v. *Jones*, 37 N.E. 371 (MA 1894) (emphasis added)).

In reaching these holdings, the Court emphasized Congress' intent in the FTCA to "provide[] much-needed relief to those suffering injury from the negligence of government employees":

> We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in *Rayonier, Inc.* v. *United*

> *States*, [352 U.S. 315, 320 (1957)], "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.

374 U.S. at 165-66. See also *id.* at 163 (refusing to impose judicial limitation on liability given that "Congress has taken steps to protect the Government from liability that would seriously handicap efficient government operations," including particularly in the exemptions for "discretionary functions" and intentional torts).

Subsequently, this Court unanimously reaffirmed that a plaintiff may state a claim under the FTCA based on a state law theory that relies, in turn, on a federal duty. In *Logue* v. *United States*, 412 U.S. 521 (1973), the Court held that the federal government was not liable under the FTCA for the negligence of employees of a county jail working under contract to the United States. But the Court held that federal officials themselves could be held liable: "This Court held in *United States* v. *Muniz*, 374 U.S. 150 (1963), that a breach of the duty imposed on the Government by 18 U.S.C. § 4042 was actionable under the Act." 412 U.S. at 528-29. The Court accordingly remanded the case for the court of appeals to determine whether the plaintiff had stated a claim against the United States. *Id.* at 532-33.

c. The decision below squarely conflicts with this Court's precedents. Petitioners' FTCA claim alleges that the United States violated 42 U.S.C. § 1986 and thereby committed negligence *per se* actionable under California law. California, in turn, looks to Section 1986 to determine the defendant's duty to the plaintiff. The Ninth Circuit did not doubt that such a duty existed, but rather held as a matter of law that the FTCA does not recognize any "cause of action which relies solely on federal law as the source of the [defendant's] duty [of care]." Pet. App. 14a.

*Muniz* and *Logue* dictate the opposite result, explicitly holding that the "duty of care" in that case arose from a federal statute that established the Bureau of Prisons' responsibilities to inmates. 374 U.S. at 164. In those decisions, this Court looked to the plain text of the FTCA and held that the only relevant question is "whether a private individual under like circumstances would be liable under state law." *Id.* at 153. In this case, by contrast, the Ninth Circuit held that, even though a private individual could be held liable on a negligence *per se* theory for violating the duty created by a federal statute such as Section 1986, the federal government could not.

There is no merit to the Ninth Circuit's contorted reading of *Muniz* in *United Scottish Insurance Co.* v. *United States*, *supra*. In that case, the Ninth Circuit construed *Muniz* "as finding a duty inhering in the nature of the custodial relationship, which is established in part by the federal statute and in part by the activity itself. Under this interpretation, the duty stems from state tort law rather than directly from the statute." 614 F.2d at 198. That reading of *Muniz* not only lacks any basis in this Court's opinion, but it also simply ignores this Court's unambiguous and unanimous holding (subsequently reaffirmed unanimously in *Logue* v. *United States*, *supra*) that the defendant's "duty of care" arose from federal law. 374 U.S. at 164. Moreover, *Muniz* explicitly holds that the prisoners properly stated claims under the FTCA notwithstanding that particular states *rejected* the claim that a duty of care arose from the custodial relationship. *Id.* (citing *O'Hare* v. *Jones*, 37 N.E. 371 (MA 1894)).

d. Nothing in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), suggests that a duty imported from federal law is cognizable under the FTCA only if state law independently recognizes an "analogous" duty. Contra *United Scottish Insurance*, *supra*, 614 F.2d at 193-94. To the contrary, *Indian Towing* establishes that Petitioners' claim should go forward under the negligence *per se* doctrine because that is the theory of liability that would be applicable

if Petitioners sued a private defendant "under like circumstances" (28 U.S.C. § 2674).

*Indian Towing* held that a plaintiff could invoke the state law "Good Samaritan" doctrine to sue the Coast Guard under the FTCA for negligently operating a lighthouse. The specific question presented was whether such a claim was barred because only the government, not private parties, operated lighthouses. This Court rejected the United States' argument that 28 U.S.C. § 2674 waived federal sovereign immunity only for conduct engaged in by private parties, explaining:

> The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "Good Samaritan" task in a careful manner.

350 U.S. at 64-65.

Nothing in *Indian Towing* supports the decision below. In the first place, *Indian Towing* looked to a state law *claim*, not a state law *duty*, that was "analogous" to the plaintiff's theory of liability. Further, the Court looked to that analogous claim – the Good Samaritan doctrine – only because that was the theory that a state court would have considered in a similar case brought against a private defendant. In this case, a claim brought by Petitioners against a private defendant for the violation of a statutory duty would be pleaded under the negligence *per se* doctrine. *Muniz*, which was decided eight years after *Indian Towing*, furthermore teaches that Petitioners' claim may rest on duties imported from federal law. See *supra* at 15-17.

Nor does the requirement of an "analogous" state law duty actually show greater solicitude for what the Ninth Circuit labeled the FTCA's "local law requirements" (Pet.

App. 14a). The court of appeals in this case held that Petitioners were required to identify a state law duty that is "analogous" to the duty imposed by Section 1986 to prevent race-based conspiracies. *Id.* 13a. But assuming that Petitioners could identify such a duty, their claim would still proceed under California's negligence *per se* doctrine, not under the separate state law duty. Thus, in *Lutz* v. *United States*, *supra*, the Ninth Circuit held that the plaintiff could sue the United States under the FTCA for negligence *per se* for the violation of an Air Force base regulation governing pets because Montana had recognized an "analogous" duty imposed on owners to control their pets. 685 F.2d at 1184.[5]

**II. This Court's Intervention Is Essential.**

Certiorari is also warranted because only this Court can conform the federal courts' interpretation of the FTCA to this

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[5] *Indian Towing* furthermore illustrates the flaw in Respondent's contention that Petitioners must identify California cases specifically recognizing negligence *per se* claims arising from violations of Section 1986. That analysis fails to consider whether California law would hold a private defendant liable "under like circumstances." Even Respondent acknowledged below (Resp. C.A. Br. 40) that the case law required by the Ninth Circuit did not exist because claims against private defendants will always be pleaded directly under the civil rights laws rather than under the negligence *per se* doctrine. In other words, Petitioners failed to identify such case law only because the question understandably had never been presented to the California courts, *not* because California would refuse to recognize such a claim. Under *Indian Towing*, the relevant inquiry is whether California's negligence *per se* doctrine applies more generally to claims that a private party failed to comply with a statutory duty to protect others. And, in any event, Petitioners are entitled to proceed on their claim because the FTCA "extends to novel and unprecedented forms of liability as well" (*Muniz*, 374 U.S. at 159).

Whether California would recognize a negligence *per se* claim in this case would remain open for the Ninth Circuit to resolve on remand. Alternatively, it could be presented to the California Supreme Court through certification. *E.g.*, *Fiore* v. *White*, 528 U.S. 23 (1999); *Florida Star* v. *B.J.F.*, 484 U.S. 984 (1987). To the extent relevant here, every indication is that California would recognize such a claim. See *supra* at 10-11 n.3.

Court's precedents and to the statute's plain text on an issue of fundamental importance to the scope of the federal government's liability.

No further percolation of the pure question of law presented by this case is warranted because the courts of appeals have uniformly embraced the Ninth Circuit's holding in *United Scottish Insurance Co.* v. *United States*, *supra*, that a plaintiff may not state a claim under the FTCA based on a state law theory that relies, in turn, on a duty created by federal law. See *United States* v. *Agronics*, 164 F.3d 1343 (CA10 1999); *Sea Air Shuttle Corp.* v. *United States*, 112 F.3d 532 (CA1 1997); *Florida Auto Auction* v. *United States*, 74 F.3d 498 (CA4 1996); *Johnson* v. *Sawyer*, 47 F.3d 716 (CA5 1995) (en banc); *Myers* v. *United States*, 17 F.3d 890 (CA6 1993); *Wood* v. *United States*, 961 F.2d 195 (CAFC 1992); *Chen* v. *United States*, 854 F.2d 622 (CA2 1988); *Cecile Indus.* v. *United States*, 793 F.2d 97 (CA3 1986); *Art Metal-U.S.A.* v. *United States*, 753 F.2d 1151 (CADC 1985); *Sellfors* v. *United States*, 697 F.2d 1362 (CA11 1983).

As the varied claims presented by these appellate decisions demonstrate, the correct answer to the questions presented by this case has profound importance for the ability of individuals to recover for the government's tortious conduct as Congress intended. Even limited narrowly to its facts, the Ninth Circuit's decision in this case has great significance because it immunizes the United States from liability for the failure of federal officials to prevent the racial conspiracies that were at the heart of the adoption of the Thirteenth and Fourteenth Amendments to the Constitution. That principle is illustrated by *Bergman* v. *United States*, 551 F. Supp. 407 (WDMI 1982), and 565 F. Supp. 1353 (WDMI 1983), and *Peck* v. *United States*, 470 F. Supp. 1003 (SDNY 1979), which involved the failure of federal officials to prevent a race-based conspiracy to harm the "freedom riders" of the civil rights movement. Both courts held that the plaintiffs could state a claim under the FTCA on precisely the theory rejected by the Ninth Circuit in this case – *viz.*, that the

federal officials committed state law negligence *per se* by violating the duty established by 42 U.S.C. § 1986 to prevent race-based conspiracies.

So far as Petitioners have been able to determine, *every state* in the nation has recognized the doctrine of negligence *per se* and *none* of those states limits the doctrine's application to violations of duties created by state or local, as opposed to federal, law.[6] The importance of the question presented is furthermore heightened by the fact that the logic of the Ninth Circuit's holding is not limited to claims of negligence *per se*, as opposed to traditional negligence. On the view of the court of appeals, a negligence claim that rests on a duty imported from federal law is *never* permitted under the FTCA.

Such a holding dramatically cabins the broad waiver of sovereign immunity that Congress intended to enact. Many, if not most, tort claims brought against the federal government under the FTCA will necessarily involve federal undertakings and will therefore be based on duties established by *federal* law. The courts of appeals, however, have adopted an unwarranted categorical prohibition against asserting such claims except in those cases in which they are least relevant – *i.e.*, cases in which the plaintiff can prove that the federal standard essentially duplicates a duty that already exists under state law.[7]

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[6] The only exception may be the State of Washington. See *Hansen* v. *Friend*, 824 P.2d 483, 486 (Wash. 1992).

[7] Nor can the United States complain that Petitioners' claim would subject it to the uniform federal standard established by Section 1986. To the contrary, the federal government's position has consistently been that it should *not* be subject to the varying duties imposed by 50 different states. See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135, 142-43 (1950).

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.[8]

Respectfully submitted,

Timothy J. Gorry
Jon Jamison-Hill
Gorry, Meyer & Rudd, L.L.P.
2029 Century Park East
Suite 400
Los Angeles, CA 90067
(310) 277-5967

Thomas C. Goldstein
Amy Howe
Thomas C. Goldstein, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

November 9, 2001

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[8] This Petition does not address the Ninth Circuit's holding, in an unrelated portion of its opinion (see Pet. App. 4a-9a), that Kim has standing to file suit on Delta's behalf. That holding no doubt has considerable significance to the government because it permits private parties to bring suits on behalf of financial institutions in federal receivership and because it arguably conflicts with *First Hartford Corp. Pension Plan & Trust* v. *United States*, 194 F.3d 1279 (CAFC 1999). Respondent may challenge that holding in this Court, however, only through a conditional cross-petition for certiorari because Respondent would be seeking to modify the court of appeals' judgment. See Pet. App. 16a (court of appeals judgment: "AFFIRMED in part and REVERSED in part"); S. Ct. R. 12.5; ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.35 (7th ed. 1993) ("The established doctrine governing appeals to all appellate courts, including the Supreme Court, is that a party must cross-appeal or cross-petition if such part seeks to change the judgment below or any part thereof. An argument which would modify the judgment even in a way that provides less relief cannot be presented without filing a cross-appeal or cross-petition.").

# APPENDIX

DELTA SAVINGS BANK, a California Savings Association; YOUNG I. KIM, an individual and shareholder, Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; DAVID HENRY; JENNIFER JONES, Defendants-Appellees.

No. 98-56775

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

October 10, 2000, Argued and Submitted, Pasadena, California

July 12, 2001, Filed

AFFIRMED in part and REVERSED in part.

Before: Betty B. Fletcher, Sidney R. Thomas, and Kim McLane Wardlaw, Circuit Judges.

B. FLETCHER, Circuit Judge:

Plaintiffs-appellants Delta Savings Bank ("Delta") and Young Il Kim ("Kim") appeal two of the district court's orders granting a motion for partial summary judgment and a motion for summary judgment in favor of the defendant-appellee United States. These rulings dispose of all issues and all parties. We affirm in part and reverse in part. Because we affirm the district court on grounds that dispose entirely of the case, we need not remand for further proceedings.

*I.*

This case is about a state licensed savings bank, Delta, that fell under the scrutiny and eventually the control of various agencies of the United States. On September 15, 1989, several individuals of Asian ancestry invested approximately $2.6 Million in Delta and took over

management of the institution. Kim invested nearly $500,000 and assumed the presidency of the bank. At the time he did so, the bank was already failing and under investigation by the Office of Thrift Supervision ("OTS"). According to plaintiffs, the bank's condition improved almost immediately, but the bank nonetheless came under increased scrutiny by the federal regulators. Plaintiffs allege that the increased scrutiny was due to a conspiracy among two OTS employees, defendants Henry and Jones, and a Delta employee, Miller, who once worked for OTS. Supposedly, these three were motivated by their racial bias against the Asian ancestry of Delta's management. This is the central theory behind plaintiffs' causes of action. Delta requested that both the Western Regional Director of the Office of the Inspector General and the California Department of Savings and Loan investigate the OTS. Both agencies began investigations into the claims of discrimination.

On May 29, 1991, Delta's board of directors authorized "any and all action necessary to file Civil Litigation against any and all parties including the OTS, . . . J. Jones, A. Miller and D. Henry." On November 8, 1991, the OTS served Delta with notice that the Resolution Trust Corporation ("RTC") had been appointed conservator and Kim was removed as president. Despite an administrative review of this action favorable to Kim, the OTS issued a Prohibition Order which forever banned Kim from working in the American banking industry. This action was appealed to this court, and the prohibition order was vacated. *Kim v. Office of Thrift Supervision*, 40 F.3d 1050, 1055 (9th Cir. 1994).

Kim, Yun Suk Seo, and Michael Kim filed suit in the United States District Court for the Central District of California against the Acting Director of the OTS. The case was assigned to District Judge David V. Kenyon. The suit sought removal of Delta's conservator on the basis that its appointment stemmed from the racial conspiracy among Jones, Henry and Miller.

On April 9, 1993, the district court granted plaintiffs leave to file a Second Amended Complaint and specifically found that the Delta directors had standing to bring suit. Subsequently, all parties stipulated to dismiss the suit to allow Delta to perfect its claim under the Federal Tort Claims Act ("FTCA") and, if necessary, re-file the action.

On September 30, 1994, Delta and Kim, in his individual capacity and as a stockholder derivatively, refiled the complaint against the United States and the OTS employees. The complaint alleged causes of action for violations of 42 U.S.C. § 1985(3), 42 U.S.C. § 1986, and 28 U.S.C. § 1346(b) based on the failure of the OTS to prevent the race-based conspiracy of its employees. On May 10, 1995, the district court granted defendants' 12(b)(1) motion to dismiss the causes of action that were based directly on § 1985(3) and § 1986, reasoning that the United States had not waived its sovereign immunity to suits brought under those provisions. However, the district court held that it had subject matter jurisdiction over the § 1346(b), FTCA, cause of action because the United States had waived its sovereign immunity to suits under that provision that were based on the combination of California's negligence per se law and § 1986. The district court also entered judgment in favor of defendants Jones and Henry on the ground that plaintiffs' claims against them were actually claims against the federal government. Plaintiffs subsequently dismissed the final individual defendant, Miller, on stipulation. The United States was the sole remaining defendant.

Judge Kenyon retired from the bench and the action was transferred to Judge William Matthew Byrne, Jr. On October 30, 1997, Judge Byrne granted the defendant's Motion for Partial Summary Judgment, holding that only the Federal Deposit Insurance Corporation ("FDIC"), as successor to the RTC, had standing to pursue the claims against the OTS on behalf of Delta. This ruling dismissed all of Delta's claims brought by Kim, in his capacity as a stockholder, officer, or director of Delta. The parties that remained were one plaintiff,

Kim, in his individual capacity, and one defendant, the United States. The remaining cause of action was a tort claim under the FTCA.

Judge Byrne granted defendant's Motion for Summary Judgment, holding that the district court did not have subject matter jurisdiction over the remaining claim because the United States had not waived its sovereign immunity. The district court subsequently denied Kim's motion to "amend the judgment" and this appeal was filed on September 29, 1998.

*II.*

A grant of summary judgment is reviewed de novo. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 830 (9th Cir. 2000); *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000). The grant of "partial" summary judgment is also reviewed de novo. *Adair v. City of Kirkland*, 185 F.3d 1055, 1059 (9th Cir. 1999).

The appellate court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir.), *cert. denied*, 528 U.S. 816, 145 L. Ed. 2d 48, 120 S. Ct. 55 (1999). The court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

*A. Kim's Statutory Standing to Sue on Behalf of Delta Under FIRREA*

On October 30, 1997, District Court Judge Byrne granted the defendant's Motion for Partial Summary Judgment, dismissing all claims brought by Delta and those brought by Kim, in his capacity as a stockholder, officer, or director of Delta. Kim's claims brought in his individual capacity remained.

The RTC had been named the conservator and then the receiver of Delta. The district court reasoned that the clear language of the Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821a, *et seq.*, transferred any rights that Kim once may have had as a stockholder, officer, and director of Delta to the RTC (and then to the FDIC). According to the district court, the rights transferred included the right to sue on behalf of Delta. It reasoned that "[t]he FDIC's position as receiver or conservator provides it with the exclusive right to file suit against those who injure the institution over which it exercises supervision."

Under FIRREA, FDIC-appointed conservators and receivers "shall . . . by operation of law, succeed to – (i) all rights, titles, powers, and privileges of the insured depository institution." 12 U.S.C. § 1821(d)(2)(A). "It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, . . . except where some provision in the extensive framework of FIRREA provides otherwise." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994). We have held that one of the rights transferred to the FDIC as receiver is the right to sue on behalf of the institution. *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998) ("Congress has transferred everything it could to the FDIC, and that includes a stockholder's right, power, or privilege to demand corporate action or to sue directors or others when action is not forthcoming.").

Despite such unequivocal language, plaintiffs make a simple plea to logic: the FDIC should not have the final say on whether it is in Delta's best interests to sue the OTS. The OTS and the FDIC are interrelated agencies with overlapping personnel, structures, and responsibilities, and thus, according to plaintiffs, the FDIC faces a conflict of interests when it contemplates a suit against the OTS. Even though the FDIC, as receiver, is supposed to represent the best interest of Delta, the FDIC may be unwilling to bring a lawsuit against the OTS because of the close ties that bind the two agencies. We agree.

In *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999), the Federal Circuit adopted a "conflict of interests" exception to the FIRREA which is similar to the exception urged by plaintiffs in this case. A large shareholder of a bank, which had been seized and placed under the receivership of the FDIC, brought suit against the United States alleging that the FDIC had breached contracts and committed unlawful takings in handling the troubled bank. *Id.* at 1284. The lower court – the Court of Federal Claims – had held that the shareholder lacked standing because only the FDIC, as receiver, had the authority to sue on the bank's behalf. *Id.* at 1294 (citing *First Hartford v. United States*, 42 Fed. Cl. 599, 612-16 (1998)). The Court of Federal Claims based its ruling, in part, on our court's holding in *Pareto*. 194 F.3d at 1294.

The Federal Circuit agreed that, "as a general proposition, the FDIC's statutory receivership authority includes the right to control the prosecution of legal claims on behalf of the insured depository institution now in its receivership." *First Hartford*, 194 F.3d at 1295. In ruling, however, that the lower court had erred, the Federal Circuit made an analogy between the lawsuit brought by the plaintiff and corporate derivative lawsuits. The point of a derivative lawsuit is to "place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." *Id.* (quoting *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991)).

Continuing the analogy to derivative lawsuits, the court focused on conflicts of interest. "[T]he FDIC was asked to decide on behalf of the depository institution in receivership whether it should sue the federal government based upon a breach of contract, which, if proven, was caused by the FDIC itself." *Id.* The court implied that, just as directors can fall prey to "misfeasance" and "conflict[s] of interest," so too might the FDIC suffer from a conflict of interest. *Id.* Without inferring "any bad faith or improper motive on the part of the

FDIC" the court held that because of the "manifest conflict of interest" presented, plaintiff had standing to sue derivatively. *Id.*

We note that the Federal Circuit expressly limited its holding in *First Hartford*. "[O]ur holding is limited to the situation here in which a government contractor with a putative claim of breach by a federal agency is being operated by that *very same federal agency*, as is the case in the receivership context." *Id.* (emphasis added) (further saying that the holding was applicable only "in a very narrow range of circumstances").

In the instant case, charges were brought against the OTS while the bank was in receivership under the RTC (which was succeeded by the FDIC). We hold that the fact that this case involves separate federal agencies does not distinguish it from *First Hartford* and we adopt the *First Hartford* exception. Based on the interrelatedness of these agencies, a "manifest conflict of interest" has arisen. These are interdependent entities with managerial and operational overlap and thus this lawsuit raises the same kind of conflict that was at issue in *First Hartford*. The government responds that the FDIC is independent from the OTS and cites statutes and cases that supposedly attest to their independence from one another. We disagree. These are not two disengaged bodies on the opposite ends of an organizational chart; these are closely related entities. The Director of the OTS is, by statute, a member of the Board of Directors of the FDIC. 12 U.S.C. § 1812(a)(1)(B). Until the RTC ceased to exist, the Director of the OTS was also a member of the Thrift Depositor Protection Oversight Board, which had oversight over the RTC. 12 U.S.C. § 1441a(a)(3)(A). An employee of the OTS can simultaneously serve as a deputy or assistant to a member of the Board of Directors of the FDIC, and in such cases, he or she is considered an "employee of the FDIC" under Title 12. 12 U.S.C. § 1812(f)(2). The FDIC and OTS jointly publish regulations, issue reports, and conduct cooperative

investigations. The OTS and RTC even share a common genesis, both having been created in FIRREA.

Furthermore, the two agencies play complementary roles in the process of bailing out failing thrifts. The OTS examines and supervises thrift institutions and can declare a bank insolvent or place it under the control of a conservator or receiver to ensure compliance with federal laws and regulations. 12 U.S.C. § 1464(d)(2)(B). The OTS may choose the FDIC to be the conservator or receiver in such cases. *See* 12 U.S.C. § 1464(d)(2)(E)(ii). Given the nature and extent of the relationship between the FDIC and the OTS, we conclude that the FDIC cannot be expected to objectively pursue lawsuits against the OTS, even when it is in the best interest of the failing bank to do so. The conflict of interest thus raised is significant and manifest. We do not suggest that the FDIC-as-receiver is faced with a disqualifying conflict every time a bank-in-receivership is asked to sue another federal agency; it is the nature of the OTS-FDIC relationship that raises the conflict here.

None of the cases cited by the defendant contradict the rule in *First Hartford. O'Melveny*, cited *supra*, stands for the proposition that the FDIC "steps into the shoes" and obtains the "rights" of the institution. 512 U.S. at 86. The Court specifically held that because California state law imputes the knowledge of corporate officers to their corporation, the FDIC is treated no differently when it "steps into the shoes" of a failing bank; the knowledge possessed by the former bank directors is imputed to the FDIC. *Id.* The strongest proposition that can be drawn from this holding is that the FDIC cannot escape the limitations that a state imposes on other corporations just because the language of FIRREA is expansive. In fact, in *O'Melveny*, the Court explicitly noted that there might be exceptions to the absolute rule it put forth, "where some provision in the extensive framework of FIRREA provides otherwise." *Id.* at 87.

The defendant also points to *Pareto*. In *Pareto*, we spoke with clarity, holding that, "Congress has transferred everything it could to the FDIC [through FIRREA], and that includes a stockholder's right, power, or privilege to demand corporate action or to sue directors or others when action is not forthcoming." 139 F.3d at 700. In the very next sentence, however, we noted that exceptions to this absolute rule were justified if the result would otherwise "be absurd or impracticable." *Id.* In *Pareto*, the result was not "absurd or impracticable" because the FDIC was qualified to decide, on behalf of the former stockholders, whether the bank should sue the directors for breaching the duty of loyalty and for misrepresenting information. *Id.* at 698. In the instant case, strict adherence to an absolute rule would be at least impracticable, and arguably absurd. The FDIC was asked to demand a lawsuit, refuse this demand, and proceed derivatively with the lawsuit *against one of its closely-related, sister agencies*. This was one hat too many to be placed atop the head of the FDIC.

We hold, following *First Hartford* and consistent with *O'Melveny* and *Pareto*, that a common-sense, conflict of interest exception to the commands of FIRREA warrants granting standing to Kim as a representative of Delta in this case. However, because we hold in Part II(B) that Delta has no cause of action against the United States under the FTCA, although we reverse the Court's finding of insufficient standing, we need not remand.

*B. The Federal Tort Claims Act*

The Federal Tort Claims Act (FTCA) acts as a waiver of the United States' traditional sovereign immunity for certain torts committed by its employees. 28 U.S.C. §§ 1346(b), 2674. "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. Furthermore, "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money

damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission, . . . if a private person[] would be liable to the claimant in accordance with the law of the place." 28 U.S.C. § 1346(b). The district court's determination of subject matter jurisdiction under the Federal Tort Claims Act ("FTCA") is reviewed *de novo*. *Brady v. United States*, 211 F.3d 499, 502 (9th Cir.), *cert denied*, 531 U.S. 1037, 148 L. Ed. 2d 536, 121 S. Ct. 627 (2000).

In their complaint, the plaintiffs' FTCA claim is based on the OTS' alleged violation of a federal civil rights statute, 42 U.S.C. § 1986. Section 1986 provides a cause of action against parties who fail to prevent conspiracies to violate the civil rights of other people. Specifically, any person who knows of a conspiracy to violate civil rights (as defined by 42 U.S.C. § 1985), and who has the power to prevent the rights violation but refuses or neglects to do so, is liable to the person injured. 42 U.S.C. § 1986.

Plaintiffs suggest, without support, that an FTCA claim can be brought for violations of federal statutes that provide private *federal* causes of action, even if there is no analogous state law. This is not so. The Supreme Court has addressed a similar issue in regards to a "constitutional tort" claim brought against the government for alleged due process violations. *FDIC v. Meyer*, 510 U.S. 471 (1994). The Court held that "the United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims," reasoning that they "have consistently held that [the FTCA's] reference to the 'law of the place' means law of the State–the source of substantive liability under the FTCA. By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." *Id.* at 478 (citations omitted). Similarly, liability under § 1986 arises from federal law, not state law and therefore cannot sustain a cause of action under the FTCA. *See Love v. United States*, 60 F.3d 642, 644 (9th Cir. 1995) ("The breach of a duty created by federal law is not, by itself, actionable

under the FTCA."); *U.S. Gold & Silver Invs. Inc. v. United States*, 885 F.2d 620, 621 (9th Cir. 1989) (FTCA does not encompass a violation of the Lanham Act).

Because the FTCA action cannot be premised on a violation of § 1986, the plaintiffs must show that the conduct of the government violates some state law. The 'law of the place' in § 1346(b) has been construed to refer to the law of the state where the act or omission occurred. *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994). Thus, any duty that the United States owed to plaintiffs must be found in California state tort law. *See Lutz v. United States*, 685 F.2d 1178, 1184 (9th Cir. 1982). The plaintiffs identify two such sources of state law: California civil rights law and California negligence per se law.

Plaintiffs argue generally that California civil rights laws forbid private parties from violating the civil rights of other parties, and that they specifically incorporate §§ 1985 and 1986 as state law causes of action. We reject both arguments. We reject the general argument because it is simply a recitation of broad statements of public policy supposedly embodied in California civil rights laws that do not, in and of themselves, provide a cause of action. Although it may be true as plaintiffs argue that the "legislative scheme underlying . . . the [California] Unruh Act and FEHA . . . generally forbid[s] the violation of another's civil rights under California Law," this statement of policy is insufficient to allow us to conclude that the Unruh Act and FEHA afford plaintiffs a cause of action in this case. The Unruh Act forbids business establishments to deny any person "full and equal accommodations, advantages, facilities, privileges, or services" on account of race, and has been limited to cases "where the plaintiff was in a relationship with the offending organization similar to that of the customer in the customer-proprietor relationship." *Strother v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 873-74 (9th Cir. 1996). Some sections of FEHA focus on an employer's obligations toward employees and applicants only. *E.g.*, Cal. Govt. Code § 12940(j)(1).

Other sections of FEHA prohibit the complicity or conspiracy to deny rights created by other civil rights laws. *E.g.*, *id.* at § 12948. None of these sections would grant a party a cause of action against a private defendant who committed acts like those allegedly committed by the United States in this case. Therefore, plaintiffs cannot sue the United States under the FTCA.

Nor are we persuaded by the argument that California Government Code § 50084 and California Civil Code § 52.1 (the Unruh Act) incorporate the Federal Civil Rights Acts and thereby support a finding that a cause of action exists against the federal government under the FTCA. The plaintiffs have not shown that these provisions provide causes of action against private entities who commit acts similar to those allegedly committed by the OTC in this case.

Plaintiffs also argue that the local law requirement of the FTCA is met through the state tort of negligence per se. California has codified its version of this rule. Cal. Evid. Code § 669.[1] The rule allows a plaintiff to prove tort liability based on the defendant's violation of a substantive statute. Appellants argue that if the forum state recognizes a claim for negligence per se for the violation of a federal statute, then the local law requirement is satisfied. The district court rejected this argument, because it "conflates two elements of

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[1] This section provides, in pertinent part:

(a) The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

Cal. Evid. Code § 669(a).

tort law: duty and the standard of care." In other words, the negligence per se doctrine does not do away with the requirement in FTCA cases that the duty must be created by state law; it only establishes the standard to which the defendant's conduct must conform. *See Lutz v. United States*, 685 F.2d 1178, 1184-85 (9th Cir. 1982) (where Montana law imposed a duty on private citizens to control their pets, member of air force was negligent per se when he breached the standard of care set forth in Base Regulation 125-5, which required the owner to maintain total control of the animal at all times). In other words, as the court explained in *Lutz*, a federal statute or regulation under which the employee acted only "becomes pertinent" in an FTCA action "when a state law duty is found to exist." *Id.* at 1184; *see also United Scottish Ins. Co. v. United States*, 614 F.2d 188, 198-99 (9th Cir. 1979) (remanding to district court to determine whether state law would impose liability on a private person who undertakes so-called "good Samaritan" activities such as an inspection and certification of an aircraft, and thus whether the government could be held liable for negligence in the inspection of an aircraft done pursuant to federal regulations), *aff'd after remand*, 692 F.2d 1209 (9th Cir. 1982), *rev'd on other grounds*, 467 U.S. 797 (1984) (claim barred under discretionary function exception).

We agree with the district court. To bring suit under the FTCA based on negligence per se, a duty must be identified, and this duty cannot spring from a federal law. The duty must arise from state statutory or decisional law, and must impose on the defendants a duty to refrain from committing the sort of wrong alleged here. *See Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1158 (D.C. Cir. 1985) ("The pertinent inquiry is whether the duties set forth in the federal law are analogous to those imposed under local tort law.") (citing *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)).

Plaintiffs argue that a state law negligence per se action can be premised on the duty arising from the federal statute, 42 U.S.C. § 1986. Thus, they argue that a FTCA cause of

action can be premised on a California negligence per se cause of action which is premised on the violation of the federal duty under § 1986. We disagree. This is an attempt to do an "end around" the local law requirements of the FTCA. If FTCA liability cannot be premised directly on alleged violations of § 1986, then neither can it be premised on a negligence per se cause of action which relies solely on federal law as the source of duty. Furthermore, even if we did allow such an "end around," plaintiffs have not cited any California cases which suggest that negligence per se actions can be premised on alleged violations of any of the federal civil rights statutes. Although FTCA violations can be premised on state negligence per se causes of action, *see Lutz*, 685 F.2d at 1185, the plaintiffs in this case have not shown that the United States was bound by a duty under California law to support such a theory.

Accordingly, we affirm the district court's order granting defendants' motion for summary judgment.

III. Law of the Case

Judge Kenyon was originally assigned to a case involving this controversy, albeit between somewhat different parties, that was a predecessor to the instant case. On April 9, 1993, in granting plaintiffs' leave to file a second amended complaint in the earlier case, Judge Kenyon specifically ruled that, despite FIRREA, Delta's directors had standing to bring suit. After that lawsuit was voluntarily dismissed and refiled in its current form, Judge Kenyon, on May 15, 1995, specifically ruled that Delta and Kim had stated a valid claim for relief under the FTCA, basing his ruling on plaintiffs' negligence per se theory.

Judge Kenyon retired and the case was transferred to Judge Byrne. Upon two separate motions by the United States, Judge Byrne essentially overruled both of Judge Kenyon's prior rulings. Both times, plaintiffs argued to Judge Byrne that he was bound to leave unmodified Judge Kenyon's rulings as the law of the case. Plaintiffs now argue that Judge

Byrne abused his discretion by ignoring the law of the case in issuing his rulings.

"We review for abuse of discretion a district judge's decision to reconsider an interlocutory order by another judge of the same court." *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1997).

We have held that:

> While courts have some discretion not to apply the doctrine of law of the case, that discretion is limited. The prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.

*Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (citations, footnotes, and internal quotation marks omitted).

Judge Byrne held that controlling authority had intervened that was unavailable to Judge Kenyon, and that would have altered the result Judge Kenyon had reached. Specifically, Judge Byrne cited *O'Melveny & Meyers v. FDIC*, 512 U.S. at 86, and *Love v. United States*, 60 F.3d 642 (9th Cir. 1995). These cases call into question Judge Kenyon's earlier rulings.

Additionally, Judge Kenyon's FIRREA ruling came in an earlier case with different parties which was voluntarily dismissed without prejudice. Judge Byrne noted that this court has held that such a dismissal "leaves the parties as though no action had been brought." *Concha v. London*, 62 F.3d 1493, 1506 (9th Cir. 1995). Plaintiffs respond that this dismissal should not affect the law of the case because the transactions and occurrences were identical in the two actions, and because the parties were only "technically" different. We disagree. *See Harbor Ins. Co. v. Essman*, 918 F.2d 734, 738 (8th Cir. 1990) (original case was dismissed by stipulation and refiled but "[b]ecause the instant case is not

the same case as the [prior action], the law of the case doctrine does not apply."); *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1214 (5th Cir. 1991) (the prior case "and the case before us are altogether separate proceedings, so law of the case is inapplicable.").

Additionally, whether or not a district court judge abuses his discretion by reversing an earlier judge's ruling, the Court of Appeals should review the merits of the ruling. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993) ("Levald's argument regarding the law of the case is also without merit. Regardless whether it was appropriate or prudent for Judge Waters to revisit the statute of limitations question when Judge Letts had already ruled on it, there is nothing that insulates either judge's conclusion from appellate review.")

Accordingly, we hold that Judge Byrne did not abuse his discretion in reaching a different conclusion than that in Judge Kenyon's earlier rulings.

AFFIRMED in part and REVERSED in part.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DELTA SAVINGS BANK, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER RE: (1) MOTION TO DISMISS UNITED STATES; (2) MOTION FOR SUMMARY JUDGMENT AS TO JONES AND HENRY

Based on the papers submitted, the Court **GRANTS IN PART AND DENIES IN PART** Defendant United States of America's motion to dismiss. Specifically, the Court **DISMISSES** Plaintiffs' second cause of action against the United States under 42 U.S.C. § 1986 for lack of subject matter jurisdiction because the federal government has not waived its sovereign immunity. However, Plaintiffs' third cause of action against the government under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), is a valid claim because the government has waived its sovereign immunity for its alleged failure to prevent a race-based conspiracy perpetrated by its employees.

In addition, the Court DENIES AS MOOT Defendants Jennifer Jones ("Jones") and David Henry's ("Henry") motion for summary judgment on the ground that the first and second causes of action against officers Jones and Henry[1] are really claims against the United States only, because these officers

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[1] The Court notes that Adrienne Miller ("Miller") has not joined in either the summary judgment motion or the government's motion to dismiss, and therefore, Plaintiffs' first cause of action against her alleging her participation in a § 1985(3) conspiracy remains intact.

are being sued in their official capacities as federal government employees. See Delta Savings Bank, et al. v. Timothy Ryan, et al., CV 91-6722 KN (Tx), July 15, 1993 Minute Order, at 2-3 (citing Kentucky v. Graham, 473 U.S. 159, 166 (1985)).

I. Factual Background

This case arises out of regulatory action taken toward Plaintiffs Delta Savings Bank and its former president, Young I. Kim, by the Office of Thrift Supervision ("OTS") for allegedly unsafe and unsound banking practices. Plaintiffs filed this suit against Defendants United States and OTS examiners Henry and Jones alleging violations of Plaintiff Kim's constitutional and civil rights.

Specifically, Plaintiffs sue the government under two causes of action: (1) for violation of 42 U.S.C. § 1986 because it had the knowledge of, and the power to prevent, the alleged harms to Plaintiffs arising out of an alleged race-based § 1985(3) conspiracy, and failed to prevent these harms (the second cause of action); and (2) for violation of the FTCA, 28 U.S.C. § 1346(b), by violating § 1986 and therefore breaching its duty of due care by being negligent per se under Cal. Evid. Code § 669(a)(1) (the third cause of action). First Amended Complaint, ¶¶ 55-59; 60-63. Plaintiffs seek damages for both violations.

In addition, Plaintiffs seek damages against OTS examiners Henry, and Jones (as well as private defendant Miller) for conspiring to cause harm to Plaintiffs based on Plaintiff Kim's race under § 1985(3) (first cause of action) and for failing to prevent this conspiracy under § 1986 (second cause of action). Id., ¶¶ 47-59.

II. Legal Analysis

The government now moves to dismiss the two claims against it on the ground that the United States has not waived its sovereign immunity from suit under these claims, and therefore, this Court lacks subject-matter jurisdiction over these matters. In addition, Henry and Jones move for

summary judgment against Plaintiffs, invoking the applicable one-year statutes of limitations and alternatively, the "qualified immunity" doctrine.

The Court will analyze each motion in turn.

A. The Government's Motion To Dismiss

1. The United States Has Waived Its Sovereign Immunity Under The Federal Tort Claims Act, But Not Under § 1985 or § 1986

"The United States government may only be sued if the government waives its sovereign immunity or the actions alleged by the plaintiffs are included within the statutory exceptions to immunity." Brian v. Gugin, 853 F. Supp. 358, 363 (D. Idaho 1994), aff'd, 46 F.3d 1138 (9th Cir. 1995) (citing United States v. Mitchell, 463 U.S. 206 (1983)). Moreover, waivers of sovereign immunity must be express. United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947) ("There can be no consent by implication or ambiguous language.").

On its face, Plaintiffs' second cause of action is based on a violation of 42 U.S.C. § 1986. To hold a defendant liable under § 1986, Plaintiffs must first establish a valid claim under 42 U.S.C. § 1985. See McCalden v. California Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1990), cert. denied, 112 S. Ct. 2306 (1992). However, neither § 1985 nor § 1986 contains any express waiver of the United States' sovereign immunity from Suit.[2]

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[2] See, e.g., Vincent v. Department of Health and Human Services, 600 F. Supp. 110, 111-12 (D. Nev. 1984), aff'd, 794 F.2d 683 (9th Cir. 3.986) ("Vincent also asserts 42 U.S C. §§ 1986 and 1988. Again, the United States did not waive her sovereign immunity in these sections."); Bergman v. United States, 844 F. 2d 353, 355 (6th Cir. 1988) (§§ 1985 and 1986 by their terms are not actionable against United States); United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982) (well-established that United States has not waived its sovereign immunity under the civil rights statutes).

In response, Plaintiffs concede that if their claims against the government were based solely on a direct violation of § 1986, such allegations would be barred under the government's cited authorities. However, Plaintiffs assert that their claims fall within a statutory exception to sovereign immunity -- the FTCA. The enforcement provision of the FTCA, 28 U.S.C. § 1346(b), provides in pertinent part that:

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Thus, the FTCA provides a waiver of sovereign immunity such that "the government 'shall be liable in the same manner and to the same extent as a private individual under like circumstances.'" United Scottish Ins. Co. v. United States, 614 F.2d 188, 192 (9th Cir. 1979) (quoting 28 U.S.C. § 2674). The "negligent performance of a federal statutory duty may give rise to a claim under the [FTCA] in circumstances in which applicable state law recognizes a private cause of action." Id. at 193.

Specifically, Plaintiffs contend that Defendants' § 1986 violation "is a violation of a statutory duty, which violation constitutes negligence per se, or 'presumed negligence' of the defendants under California Evidence Code § 669(a), thereby imposing liability on the United States under the FTCA." Plaintiffs' Opp. Memo, at 3. In Bergman v. United States, 579 F. Supp. 911, 934 (W.D. Mich. 1984), a case on which Plaintiffs heavily rely, the court found that the plaintiff "Freedom Riders" could sue the federal government under the

FTCA, in part, because the violation of § 1986 was actionable under state law. The court held that § 1986 created a statutory duty under Alabama negligence per se law that the federal government violated by failing "to prevent the racially motivated conspiracy from depriving the freedom riders of the equal protection of the laws." Id. at 934.

As in Bergman, Plaintiffs here allege that the government breached its federal duty under California negligence per se law by failing to prevent its employees from embarking on the alleged race-based conspiracy to violate Plaintiffs' rights. Cal. Evid. Code § 669(a) codifies the common law presumption that a violation of a statute, including a federal one, constitutes negligence per se if the statute was enacted to protect the class of persons to which Plaintiffs belong.[3] Section 1986 creates a primary statutory duty for all persons who have knowledge of, and the power to prevent, race-based conspiracies to actually prevent such conspiracies from taking form. Under the rubric of the FTCA, § 1986 creates a duty under California negligence per se law binding any state citizen to prevent race-based conspiracies, and therefore, that duty also inures to the federal government. Thus, plaintiffs state a valid claim under the FTCA based on the breach of a federal duty incorporated as part of California negligence law.

The government proffers two arguments, both of which fail. First, the government contends that Plaintiffs' reliance on Bergman is misplaced. Specifically, the government argues that Bergman failed to properly apply Ninth Circuit law as announced in the Scottish case because, by automatically invoking state negligence per se law, the Bergman court

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[3] Cal. Evid. Code § 669(a) states that a person is presumptively negligent if: (1) he violates a statute; (2) this violation was the proximate cause of the injury to the plaintiff; (3) the injury was of the nature which the statute was designed to prevent; and (4) the plaintiff was one of the class of persons the statute was designed to protect. This presumption of negligence is rebuttable if the person violating the statute acted as a reasonable person who desired to comply with the law would under the same circumstances. Cal. Evid. Code § 669(b).

incorrectly applied § 1986 without considering whether there was an analogous state law that bound private individuals. However, Defendants misread and misapply Scottish to the facts of Bergman; in fact, the holdings of these two cases are consistent.

In Scottish, the Ninth Circuit explicitly stated that, to hold the U.S. government liable for violating a federal statute under a state's negligence per se laws, the plaintiff must show that the government would have been liable for negligence had it been a private party charged under analogous state law; in so doing, the court rejected the "automatic application of state negligence per se law." 614 F.2d at 192. Analyzing precedent from various jurisdictions, the Scottish court reasoned:

> An important policy underlies these holdings that a federal statutory duty does not automatically give rise to a duty of care to which a state's negligence per se doctrine would be applied. The government undertakes conduct in a variety of ways. Much of it, e.g., delivery persons driving trucks, is exactly what private corporations and persons ordinarily do. In other activities, however, such as inspecting privately owned aircraft, the government performs what may be called "good samaritan" functions. Although such functions are carried out pursuant to statute or to regulations, they do not arise from a primary duty to provide the service in question. Thus, not only would there be no potential liability if government declined to provide such services at all, but the government does not purport to relieve other actors of the primary duty to see that the underlying activity is accomplished safely or consistently with some other important public policy. If such undertakings automatically created a cause of action for negligent performance, the government might be less inclined to assume such tasks in the future.

Id., 614 F.2d at 193 (emphasis added). Reviewing the facts before it, the court held that the U.S. government could be held liable for violating California's "good samaritan" law by negligently conducting a safety inspection of a private aircraft that subsequently crashed. While the government was required under Federal Aviation Administration ("FAA") regulations to conduct such inspections, the FAA regulations did not, in and of themselves, create a statutory duty to inspect. Nonetheless, the court reasoned that once the government decided to inspect the aircraft, it had a duty to do so in a non-negligent manner under California's "good samaritan" laws. Id. at 193-94.

Scottish is not inconsistent with Bergman because even though it is distinguishable on its facts, Scottish is consistent with Bergman in its application of the law. Factually, Scottish did not involve a federal statute that creates a duty for everyone under California's negligence per se laws. The FAA regulations at issue in Scottish only apply to the United States, not to private individuals; in contrast, as described in Bergman, § 1986 creates a primary duty for all individuals under California negligence per se law to prevent race-based conspiracies. Simultaneously, § 1986 creates a private cause of action for injured parties rather than establishing a general law created simply for the public's benefit.[4] Despite this factual distinction, Scottish applies the "analogous state law" rule in the same manner as Bergman: Both cases recognize that federal laws can create primary duties that bind the United States for purposes of a state's negligence per se law when a private individual would also be subject to the same

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[4] See also Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1153 (D.C. Cir. 1985). The plaintiff in Art Metal was a contractor that claimed a government agency had unlawfully barred it from contracting with that agency without initiating any of the formal debarment procedures required by federal procurement regulations. The court held that without an analogous duty under local tort law, the government's negligent performance of a duty created by federal statute was not actionable under the FTCA.

duty. The government's contention that there is no state law analogous to § 1986 misses the point; the relevant inquiry is whether § 1986 creates a duty that would bind a private individual under the state's negligence per se laws. See, e.g., Daniel A. Morris, Federal Tort Claims § 2:13, at 27 (1993) ("There have been cases where the government's failure to follow a federal statute or regulation is alleged to constitute negligence per se. However, if the particular statute involved is aimed at protecting the public and does not create a private right, violation of the statute may not be enough, standing alone, to show a right against the United States.").

Second, the government argues that the California negligence per se statute simply relaxes the evidentiary standard, but does not create a separate cause of action that satisfies the FTCA's "analogous state law" requirement. Again, the government reads too much into this rule. As invoked in Bergman and as applied here, § 1986 serves merely as the source of the statutory duty that allows Plaintiffs to bring suit against the United States; however, it is California's negligence per se law that supplies the analogous state law claim required by the FTCA.

For all of the foregoing, the Court holds that Plaintiffs have stated a valid claim under the FTCA.

2. Plaintiffs' Claims Are Not Barred By The "Discretionary Function" Exception

As an alternate argument, the government contends that 28 U.S.C. § 2680(a) provides an exception to waiver under the FTCA for

> [a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.

The purpose of the "discretionary function" exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and

political policy through the medium of an action in tort." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984). The underlying theory is that by subjecting administrative decisions to judicial review and possibly holding the government liable for those acts which, in hindsight, appear negligent, the United States would be forced to restrict the breadth of discretion it endows its agents; in turn, this would hamper the ability of those agents to best pursue their agency's regulatory goals. Under relevant case law, the exception applies when government agents engage in discretionary functions that: (1) involve judgment or choice; and (2) are the type of actions the exception was intended to shield. United States v. Gaubert, 499 U.S. 315, 322-23 (1991). Specifically, the government argues that Jones's and Henry's conduct in regulating Plaintiffs' bank involved both judgment or choice and are the type of actions that the discretionary function exception was intended to shield.

In response, Plaintiffs assert that these thrift officers' discretion may be removed by a specific mandatory governmental policy duly adopted under authority delegated by statute or regulation. Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1026 (9th Cir. 1989). Here, Plaintiffs contend that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Section 308,[5] and the federal regulations promulgated in accordance therewith, specifically outline a policy requiring the OTS to ensure that minorities and women participate "to the maximum extent possible in all contracts entered into by the OTS." 12 C.F.R. § 517.3. Plaintiffs conclude that the discriminatory activity alleged in this case could not have been the kind of conduct the discretionary function exception was designed to protect.

In rebuttal, the government argues that because Plaintiffs' only claim against the government is that it was negligent in

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[5]Pub. L. No. 101-73, 103 Stat. 183 (1989).

its supervision of its employees, Jones and Henry, the discretionary function exception applies because the government is allowed great discretion in how it supervises its employees. Atallah v. United States, 955 F.2d 776, 784 (1st Cir. 1992) (citing Gaubert, 499 U.S. at 332-33). Moreover, the government asserts that FIRREA and its provisions do not specifically abrogate the government's discretion in supervision except to generally state that the government should ensure the maximum participation of minorities. Finally, the government concludes that Jones's and Henry's conduct, even if discriminatory, is irrelevant to Plaintiffs' assertion that the government negligently supervised its employees because Plaintiffs claim does not stem from the employees' actions, only the government's.

The Court rejects the government's arguments and agrees with Plaintiffs on this issue. First, the discretionary function exception could not have been intended to allow the government to violate plaintiffs' civil rights by failing to prevent the alleged race-based conspiracy perpetrated by Jones and Henry. Indeed, "[a] discretionary function can derive only from properly delegated authority. Discretion may be as elastic as a rubber-band, but it too has its breaking point." Birnbaum v. United States, 588 F.2d 319, 329 (2d Cir. 1978). Plaintiffs do not allege that the government properly delegated the authority to engage in a race-based conspiracy to Jones and Henry; rather, Plaintiffs allege that the race-based conspiracy was a tortious act committed by the officers and ratified by the government through its alleged failure to prevent this conspiracy. It would be absurd for this Court to hold that the discretion to engage in a race-based conspiracy was one of the powers the government delegated to its officers in the course of regulating Plaintiffs' bank. Moreover, unlike most cases in which the exception is invoked, this case does not simply allege negligence in the government's and its employees' conduct, but rather, Plaintiffs contend that the government engaged in the knowing violation of the FTCA

by breaching its § 1986 duty to prevent the alleged race-based conspiracy.

And second, FIRREA's regulations clearly evince a policy of non-discrimination and the advancement of minority concerns. These regulations strongly suggest that it was not within the discretion of OTS officers Jones and Henry to engage in any purposefully discriminatory activity. As the Supreme Court noted in Gaubert, "the requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" 499 U.S. at 322 (citing Berkovitz v. United States, 486 U.S. 531, 536 (1988)).[6] Accordingly, the Court holds that, considering the complaint's allegations in the light most favorable to Plaintiffs, the discretionary function exception does not shield the government from suit. Thus, the Court can properly exercise subject matter jurisdiction over this matter.

B. Jones And Henry's Motion For Summary Judgment

Plaintiffs' complaint alleges that: (1) OTS officers Henry and Jones, and former officer Miller, engaged in a race-based § 1985(3) conspiracy (first cause of action) and (2) that Jones and Henry failed to prevent this conspiracy in violation of § 1986 (second cause of action).

Defendants Henry and Jones move for salary judgment on alternate Grounds. Defendants first contend that the one-year statutes of limitations applicable to § 1985(3) and § 1986 bar the first and second causes of action; alternatively, Defendants argue that they are entitled to qualified immunity for their actions.

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[6] The Gaubert court also noted that in order for a complaint to survive a motion to dismiss, it must allege facts supporting a finding that the challenged actions are not "the kind of conduct that can be said to be grounded in the policy of the regulatory regime." 499 U.S. at 324-35. It is not surprising that Defendants do not contend or show that the OTS has a policy of promoting race-based conspiracies against banks it regulates.

The Court **DENIES AS MOOT** Defendants' summary judgment motion because the Court finds that Plaintiffs' first and second causes of action are not viable against Jones and Henry sued in their official capacity as government employees. Specifically, the Court previously held in Plaintiffs' related 1991 action that their § 1985(3) and § 1986 claims against the officers were really asserted against the United States because the officers were sued in their official capacities. See Delta Savings Bank, et al. v. Timothy Ryan, et al., CV 91-6722 KN (Tx), July 15, 1993 Minute Order, at 2-3 (citing Kentucky v. Graham, 473 U.S. 159, 166 (1985)). In the present suit, Plaintiffs once again sue Jones and Henry in their official capacities. First Amended Complaint, ¶¶ 50-51. Accordingly, the Court adopts its prior ruling and holds that the first and second causes of action against Henry and Jones are really suits against the federal government, and are therefore only properly brought under the FTCA. See supra Section II(B).

Therefore, the Court does not reach the merits of Jones and Henry's motion for summary judgment, but simply **DENIES** the motion as moot.

C. Conclusion

In light of all the foregoing, the only remaining claims in this case are: (1) Plaintiffs' first cause of action against Miller for her participation in the alleged § 1985(3) race-based conspiracy; and (2) Plaintiffs' third cause of action against the United States for violation of the FTCA based on the government's alleged failure to prevent the commission of wrongful acts arising out of Jones's, Henry's, and Miller's race-based conspiracy under § 1985(3). The United States' obligation to prevent the alleged harms arises out of the federal statutory duty under § 1986 incorporated into California negligence per se law by Cal. Evid. Code § 669.

**IT IS SO ORDERED.**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DELTA SAVINGS BANK, et al.,
Plaintiffs,
v.
UNITED STATES, et al.,
Defendants.

CASE NO. CV 94-6621 KN
ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF MAY 15, 1995 ORDER

Based on the papers submitted, the Court **DENIES** the Government's motion for reconsideration of this Court's May 15, 1995 order ("the Order") regarding the government's motion to dismiss.

Local Rule 7.16 provides the basis upon which a court may reconsider its order:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider such material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

See, e.g., Van Ryn v. Korean Airlines, 640 F. Supp. 284, 286 (C.D. Cal. 1985) (citing Local Rule 7.16).

The government moves the Court to reconsider two conclusions it reached in the prior order: (1) that 42 U.S.C. § 1986 creates a statutory duty incorporated into California negligence per se law, thereby waiving the government's sovereign immunity under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), and (2) that Plaintiffs' claims are not barred by the discretionary function exception to the waiver under the FTCA. See Order at 3-12. The Court shall consider each argument in turn.

I. The Government's Citation To **Johnson v. Sawyer** Does Not Warrant Reconsideration Of This Court's Prior Holding That California's Negligence **Per Se** Law, Which Incorporates The § 1986 Statutory Duty, Subjects The Government To Liability Under The FTCA

The government challenges the Court's prior Order, stating that the Court incorrectly concluded the government may be held liable under the FTCA. Specifically, the government cites Johnson v. Sawyer, 47 F.3d 716, 729 (5th Cir. 1995) (en banc), in which an en banc panel of the Fifth Circuit recently rejected the argument that a duty giving rise to a claim under the FTCA must be grounded in state law separate and apart from a federal statutory duty incorporated into the state's negligence per se law.

The Court disagrees with the government's position for several reasons. First, even though Sawyer is a "new" decision that was announced after briefing was completed on the prior motion, Sawyer raises legal arguments that the Court already considered in its prior Order.[1] Consequently, the Court need not repeat its analysis here, but simply refers the parties to the previous Order. Second, Sawyer is not binding on this

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[1] Indeed, Sawyer, 47 F.3d at 729, cites Art Metal-U.S.A., Inc. v. United States, 753 F-2d 1151 (D.C. Cir. 1985), which the Court specifically cited in its prior order. Order at 8 n.4.

Court because it is a decision from the Fifth Circuit. And third, the federal statute involved in Sawyer, 26 U.S.C. S 6103(a)(1), "which proscribes the disclosure of tax return information by federal employees,"[2] does not impose a primary duty upon private citizens; 42 U.S.C. § 1986, however, imposes a duty upon all people. See Order at 5-8.

Accordingly, the Court **DENIES** the government's motion for reconsideration on this issue.

II. The Government Does Not Raise Any New Legal Or Factual Claims In Its Motion For Reconsideration Of The Court's "Discretionary Function" Ruling

The government contends that the Court focused too closely on the actions of Defendants Jones and Henry in determining that the "discretionary function" exception did not bar Plaintiffs' claims. However, this argument is but a variation of the government's contention in its previous motion that the Court should decide whether the actions of Jones and Henry's supervisors constituted conduct the discretionary function doctrine was designed to protect. The Court previously considered and rejected this argument, holding that Plaintiffs sufficiently stated a claim by contending "the government engaged in the knowing violation of the FTCA by breaching its § 1986 duty to prevent the alleged race-based conspiracy." Order at 11. In addition, the government cites no new legal authority to support its previously-raised claims.

In light of the foregoing, the Court also **DENIES** the government's reconsideration motion on this issue.

IT IS SO ORDERED

Dated: July 24, 1995

DAVID V. KENYON

United States District Judge

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[2] Sawyer, 47 F.3d at 718.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DELTA SAVINGS BANK, a California Savings Association; YOUNG I. KIM, an individual and shareholder,
Plaintiff,
v.
UNITED STATES OF AMERICA; DAVID HENRY, an individual; JENNIFER JONES, an individual; ADRIENNE MILLER, an individual, and DOES 1-20, inclusive,
Defendants.

CV 94-6621-WMB (Mcx)

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Young Il Kim ("Kim") and Delta Savings Bank ("Delta") (collectively, the "plaintiffs") filed this action on September 30, 1994. Plaintiffs sued the United States under 42 U.S.C. §§ 1985 and 1986 and under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401-2416 (FTCA). Plaintiffs also sued Jennifer Jones and David Henry, who are employees of the Office of Thrift Supervision ("OTS"), and Adrienne Miller, a former employee of both Delta and OTS. The case was assigned to Judge David Kenyon.

On November 8, 1991, Delta was seized by the OTS and Kim, its president, received notice that the agency would seek to impose a prohibition order preventing him from working again in the American banking industry. Kim contested the proposed order in proceedings before an OTS Administrative

Law Judge (ALJ). The ALJ concluded that OTS had not met its burden of proof for issuance of a prohibition order on September 18, 1992. Nonetheless, the agency issued a prohibition order against Kim on April 15, 1993. Kim then appealed to the Ninth Circuit, which reversed the OTS order. Kim v. OTS, 40 F.3d 1050, 1054 (9th Cir. 1994).

Plaintiffs then filed this lawsuit. Plaintiffs contend that Kim improved Delta's financial condition after he was named president of the bank in the fall of 1989. Despite this, plaintiffs contend that OTS's employees treated him differently than they did Delta's former officers, who were white.[1]

After seizing the bank OTS appointed the Resolution Trust Corporation (RTC) as Delta's conservator. On May 7, 1992, OTS ordered that RTC serve as the bank's receiver. RTC ceased operations on December 31, 1995. The Federal Deposit Insurance Corporation (FDIC) succeeded the RTC as receiver of Delta.

Shortly after plaintiffs filed this action, the United States moved to dismiss on its own behalf and moved for summary judgment on behalf of defendants Henry and Jones. In an order dated May 10, 1995, Judge Kenyon concluded that the United States had not waived its sovereign immunity to suit under 42 U.S.C. §§ 1985 or 1986, and therefore that the Court "lack[ed] subject matter jurisdiction over these matters." (May 10, 1995 Order at 3.) The Court also entered judgment in

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[1] Plaintiffs contend that Henry, who conducted a November, 1990, field examination of Delta, attempted to force Delta's board of directors to fire Kim and hire Miller in his place. Miller had previously served as the OTS examiner-in-charge of Delta, and was hired by the bank as its Chief Operating Officer in the spring of 1990. After Henry's field examination, Jones, the Acting Assistant Regional Director of OTS, issued a series of directive letter and civil money penalty letters to the bank. Jones also recommended that the bank fire Kim. Kim apparently began to conclude that Miller was working against him. Delta's board fired Miller on February 20, 1991. Later that year, OTS initiated the administrative proceedings against Delta and Kim that gave rise to this lawsuit.

favor of Jones and Henry. However, the Court retained "Plaintiffs' third cause of action against the United States under the FTCA based on the government's alleged failure to prevent the commission of wrongful acts arising out of Jones's, Henry's, and Miller's alleged race-based conspiracy under § 1985(3)." Id. at 13. Judge Kenyon concluded that "the United States' obligation to prevent the alleged harms arises out of the federal statutory duty under § 1986 incorporated into California negligence per se law by Cal. Evid. Code § 669." Id. at 13-14. Plaintiffs subsequently dismissed Miller, the remaining individual defendant, on stipulation.

On June 19, 1997, after considering briefing by the parties, this Court ruled that plaintiff was not entitled to a jury trial against the United States, the sole defendant remaining in the case. The Court also suggested that the parties resolve whether plaintiffs could maintain this action on behalf of Delta by way of a motion for partial summary judgment, based on a joint statement of stipulated facts. The parties filed a joint statement of stipulated facts on July 14, 1997. The United States now moves for partial summary judgment on stipulated facts. It seeks to dismiss all claims asserted by Delta and all claims asserted by Kim that allege injury to his ownership interest in Delta.

I. LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that a Court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986). A factual dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Id. at 2514. If the moving party satisfies this burden, Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or is as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

II. DISCUSSION

A. Merits

As a seized bank, Delta's legal rights are subject to the prescriptions of the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821a, et seq. Under FIRREA, the FDIC, as Delta's conservator and receiver "shall . . . by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution." Id. at § 1821(d)(a)(A)(i). The FDIC is entitled to conduct "all business of the institution" and "collect all obligations and money due the institution." Sanhi v. American Diversified Partners, 83 F.3d 1054, 1058 (9th Cir. 1996). "It is hard to avoid the conclusion that § 1821(d)(a)(A)(i) places the FDIC in the shoes of the insolvent S&L, . . . except where some provision in the extensive framework of FIRREA provides otherwise." O'Melveny & Myers v. FDIC, 512 U.S. 79, 86-87 (1994).

The FDIC's position as receiver or conservator provides it with the exclusive right to file suit against those who injure the institution over which it exercises supervision. A "corporation allegedly injured by the actions of individual defendants no longer possess[es] the legal right to bring such

an action; all such rights ha[ve] been effectively transferred to the FDIC as receiver for the failed bank." American Casualty Company of Reading, PA, v. FDIC, 39 F.3d 633, 637 (6th Cir. 1994).

Kim accordingly may not sue on Delta's behalf. Nor may he sue as a stockholder of Delta. The FDIC succeeded to all rights of both Delta and "any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institutions." 12 U.S.C. § 1821(d)(a)(A)(i); see also FDIC v. Benson, 867 F. Supp. 512, 518 (S.D. Tex. 1994) (the rights of the institution include the "bank's creditors, depositors, and shareholders"). Accordingly, any stockholder's derivative action "must have been brought on behalf of the successor to the corporation's legal right to bring such an action - the FDIC." American Casualty, 39 F.3d at 637; In re South East Banking Corp. v. Basset, 69 F.3d 1539, 1544 (11th Cir. 1995) (affirming district court's holding that the claims derived from injury to the corporation "belong exclusively to the FDIC receiver and successor in interest to the shareholders of the . . . bank").[2]

Furthermore, because "any obligation to shareholders or members arising as a result of their status as shareholders or members" is satisfied last, after paying the expenses of the receiver, and claims of depositors or creditors, 12 U.S.C. § 1821(d)(11)(A)(v), allowing Kim to sue as a stockholder or an officer would "circumvent the priority scheme" set forth in FIRREA. Hamid v. Price Waterhouse, 51 F.3d 1411, 1420 (9th Cir. 1995) (only a bank or its receiver, and not a depositor, has standing to bring a RICO suit to recover losses due to an alleged conspiracy).[3]

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[2] Furthermore, even if Delta was not in receivership, the requirements for filing a shareholder's derivative suit under Fed. R. Civ. P. 23.1 have not been satisfied.

[3] It would also frustrate the goals of Congress. As the Senate report to FIRREA explained, "The Committee intends the RTC and the FDIC to use

Plaintiff argues that if Kim does not bring the suit on behalf of Delta, no one else will. However, because the FDIC "steps into the shoes" of Delta, it inherits all of Delta's rights, and may assert those rights as it chooses and as FIRREA directs. O'Melveny & Myers, 512 U.S. at 86. The FDIC presumably could pursue the suit against the United States if it so desired. "[T]he FDIC is not the United States, . . . and even if it were we would be begging the question to assume that it was asserting its own rights rather than, as receiver, the rights of [the institution]." Id. at 86.[4] But it is not for Kim, who no longer has any right to act for Delta, to volunteer his services in lieu of the FDIC.[5]

B. Law of the Case

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private persons of entities to the extent that such entities can further the RTC's general asset disposition objectives, if in the sole discretion of the RTC or FDIC, such private persons or entities are available, practical, and efficient. . . . The Committee does not intend this provision to create a private right of action for frustrated private parties, however . . . ." S. Rep. No. 19, 101st Cong. 1st Sess. at 31 (1989).

[4] Indeed, the interests of the FDIC has been adverse to those of the United States before. See, e.g., United States v. FDIC as receiver of Eastland Savings Bank, 899 F.Supp. 50 (D.R.I. 1995); FDIC as receiver of Metro Bank v. United States, 527 F. Supp. 942 (S.D. W. Va. 1981).

[5] At the August 13th hearing, plaintiffs suggested that Far West Federal Bank v. Office of Thrift Supervision Director, 119 F.3d 1358 (9th Cir. 1997), affects the outcome of this motion. However, a review of Far West reveals that it is distinguishable from the present case. In Far West, the government induced investors to put money in an ailing savings and loan through promises of regulatory forbearance. A change in the law, however, led the government to breach its obligations under the agreement. The Ninth Circuit in Far West found that "the sole purpose of the entire transaction . . . was for the Investors to invest $26.6 million in [the savings and loan] in exchange for promises . . . to regulate [it] in a manner that would make their investment financially sound." Id. at 1364. Kim's alleged injury is not a wrong he suffered individually as a shareholder, unlike the investors in Far West who faced an abrogation of the very agreement that induced them to become investors in the first place.

Plaintiffs argue, however, that the question whether Kim may pursue the suit on behalf of Delta and as a stockholder has already been answered in the affirmative by Judge Kenyon. Pursuant to the law of the case doctrine, they argue, that decision should not be revisited.

The law of the case doctrine

> posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues.

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988).

Judge Kenyon, relying on a New Jersey district court case that both was decided before O'Melveny & Myers, 512 U.S. at 85-86, and was reversed by the Third Circuit, see Rosa v. Resolution Trust Corp., 938 F.2d 383 (3rd Cir. 1991), ruled in the case Delta Savings Bank v. Ryan, CV91-6722, that Delta had standing to bring a suit against an individual officer of OTS largely because the receiver would be unlikely to do so. His decision is not dispositive of this motion for three reasons.

First, Delta Savings Bank v. Ryan was a different case with different parties and was ultimately dismissed without prejudice. It therefore does not constitute the law of this case. Even apart from the fact that the parties to this case were, with the exception of Delta, not parties to that case, "a second civil action after voluntary dismissal of the first one is not the same litigation for purposes of applying . . . the law of the case doctrines." Thorpe v. Albers, Inc., 922 F. Supp. 84, 94 (E.D. Tenn. 1996). Instead, such a dismissal "leaves the parties as if no action had been brought." Concha v. London, 62 F.3d 1493, 1496 (9th Cir. 1995).

Secondly, to the extent that O'Melveny & Myers v. FDIC, 512 U.S. at 86, clarifies the rights and duties of the

FDIC as receiver of Delta, this Court must apply the Supreme Court's precedent, which unambiguously vests all of Delta's legal rights in the FDIC, regardless of Judge Kenyon's prior decision. See Heger v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995) (intervening controlling authority is ground to depart from law of the case).

Finally, even if Judge Kenyon's decision in Ryan somehow did constitute the law of the case here, this Court would not be precluded from revisiting that decision. The law of the case doctrine is a discretionary and prudential rule. United States v. 1.33 Acres, 9 F.3d 70, 73 (9th Cir. 1993); United States v. Mills, 810 F.2d 907, 909 (9th Cir. 1987). Accordingly, "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance." Christianson, 486 U.S. at 817. Thus, "[t]he law of the case doctrine does not . . . limit the court's power to reconsider or change its decision, it merely protects the ability of the court to build to its final judgment by cumulative rulings." 18 Daniel R. Coquillette, et al., Moore's Federal Practice § 134.22[1][a] (3d ed. 1997). Because only the FDIC may sue the United States on behalf of Delta or its stockholders, this Court is not precluded from revisiting any preliminary decision that suggested otherwise.

C. Conclusion

The law of the case doctrine does not preclude the Court from making a determination of whether Kim may sue on behalf of Delta, or as a stockholder, officer, or director of Delta. FIRREA provides that only the FDIC may sue on behalf of Delta or its stockholders, officers, and directors. Accordingly, Kim may not sue on behalf of Delta or as a stockholder, officer, or director of Delta.

III. CONCLUSION

For the foregoing reasons, this Court GRANTS defendant's motion for partial summary judgment.

Date: October 23, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DELTA SAVINGS BANK, a California Savings Association; YOUNG I. KIM, an individual and shareholder,
Plaintiff,
v.
UNITED STATES OF AMERICA; DAVID HENRY, an individual; JENNIFER JONES, an individual; ADRIENNE MILLER, an individual, and DOES 1-20, inclusive,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On September 30, 1994, plaintiffs Young Kim ("Kim") and Delta Savings Bank ("Delta") filed a lawsuit against the United States government and David Henry and Jennifer Jones, two employees of the Office of Thrift Supervision (OTS).[1] Plaintiffs claimed defendants violated 42 U.S.C. § 1985(3); 42 U.S.C. § 1986; and 28 U.S.C. § 1346(b), the Federal Torts Claims Act (FTCA).

In an order dated May 15, 1995, Judge David Kenyon dismissed plaintiffs' first and second causes of action under 42 U.S.C. §§ 1985 and 1986 because the U.S. government had not waived its sovereign immunity and therefore the

[1] On December 29, 1994, plaintiffs filed a first amended complaint adding Adrienne Miller, a former employee of both Delta and OTS, as a defendant. On January 10, 1996, the parties signed a stipulation dismissing Miller from the case.

Court "lack[ed] subject matter jurisdiction over these matters." (May 15, 1995, Order at 3). The Court further held that the "causes of action against Henry and Jones are really suits against the federal government, and are therefore only properly brought under the FTCA."[2] (Id. at 13).

The Court retained, however, plaintiff's "third cause of action against the United States under the FTCA based on the government's alleged failure to prevent the commission of wrongful acts arising out of Jones's, Henry's, and Miller's alleged race-based conspiracy under § 1985(3)." Id. at 13. Judge Kenyon concluded that "the United States' obligation to prevent the alleged harms arises out of the federal statutory duty under § 1986 incorporated into California negligence per se law by Cal. Evid. Code § 669." Id. at 13-14. In July, 1995, Judge Kenyon denied defendant's motion for reconsideration as to this remaining claim.

The case was subsequently transferred to this Court. On October 31, 1997, this Court granted defendant partial summary judgment, dismissing all claims asserted by Delta and all claims asserted by Kim that alleged injury to his ownership interest in Delta. Thus, the remaining parties in this suit are the United States government and Mr. Kim suing on his own behalf under the FTCA.

The government has now filed a motion for summary judgment, to dismiss Kim's remaining claim. Plaintiff claims that the government raised similar arguments in its earlier motion to dismiss and motion for reconsideration that Judge Kenyon rejected.

## I. FACTUAL BACKGROUND

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[2] More specifically, the Court denied defendants' summary judgment motion as moot, as it had "previously held in Plaintiffs' related 1991 action that their § 1985(3) and § 1986 Claims against the officers were really asserted against the United States because the officers were sued in their official capacities." (May 15, 1995, Order at 12-13).

On November 8, 1991, Delta was seized by the OTS and Kim, its president, received notice that the agency would seek to impose a prohibition order preventing him from working again in the American banking industry. Kim contested the proposed order in proceedings before an OTS Administrative Law Judge (ALJ). The ALJ concluded that OTS had not met its burden of proof for issuance of a prohibition order on September 18, 1992. Nonetheless, the agency issued a prohibition order against Kim on April 15, 1993. Kim then appealed to the Ninth Circuit, which reversed the OTS order. Kim v. OTS, 40 F.3d 1050, 1054 (9th Cir. 1994).

Plaintiff then filed this lawsuit. Plaintiff contends that Kim improved Delta's financial condition after he was named president of the bank in the fall of 1989. Despite this, plaintiff argues that OTS's employees treated him differently than they did Delta's former officers, who were white.

Plaintiff contends that Henry, who conducted a November, 1990, field examination of Delta, attempted to force Delta's board of directors to fire Kim and hire Miller in his place. Miller had previously served as the OTS examiner-in-charge of Delta, and was hired by the bank as its Chief Operating Officer in the spring of 1990. After Henry's field examination, Jones, the Acting Assistant Regional Director of OTS, issued a series of directive letters and civil money penalty letters to the bank. Jones also recommended that the bank fire Kim. Kim apparently began to conclude that Miller was working against him. Delta's board fired Miller on February 20, 1991. Later that year, OTS initiated the administrative proceedings against Delta and Kim that gave rise to this lawsuit.

Plaintiff believes that the actions of government employees Henry and Jones against him were motivated by his race or national origin. According to plaintiff, at least one witness heard Henry state that he (Henry) was "banging up the Korean." (First Am. Compl. at ¶ 37). In his complaint, plaintiff further states that the United States violated 42

U.S.C. § 1986 by failing "to prevent the commission of the wrongful actions [by its agents]," which it "could have prevented through the use of reasonable diligence." (Id. at ¶ 58). As noted above, Judge Kenyon held that the court lacked subject matter over a cause of action under § 1986 against the United States.

In support of his FTCA claim, plaintiff asserts that

> [i]n violating the statute 42 U.S.C. § 1986, . . . Defendant United States breached its duty of care to plaintiffs and was negligent per se under California Evidence Code section 669(a)(1). Accordingly, defendant United States' negligence per se under California state tort law provides plaintiffs with the basis for this cause of action and imposing liability on defendant United States under the Federal Torts Claims Act, 28 U.S.C. section 1346(b).

(Id. at ¶¶ 61-62). The government, in turn, argues that California's negligence per se law cannot provide the basis for liability in this case.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Id. at 256. If the moving party satisfies this burden, Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or

> denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

## III. DISCUSSION

### A. FTCA and the Waiver of Sovereign Immunity

As a general matter, "[t]he United States, as a sovereign entity, is immune from suit unless it has consented to be sued. Waiver of immunity must be demonstrated by the party suing the United States." Cominotto v. United States, 802 F.2d 1127, 1129 (9th Cir. 1986); see also FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). One such waiver is the FTCA,[3] which "provides a waiver of sovereign immunity for tortious acts of an agency's employees only if such torts committed in the employ of a private person would have given rise to liability under state law." Pereira v. United States Postal Service, 964 F.2d 873, 876 (9th Cir. 1992); see also Gasho v. United States, 39 F.3d 1420, 1427 (9th Cir. 1994) ("Liability [under the FTCA] is

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[3] The law provides that

> the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (West 1997).

determined by the tort law of the state where the claim arose."), cert. denied, 515 U.S. 1144 (1995).

In FDIC v. Meyer, the Supreme Court held that a plaintiff's constitutional tort claim "is not cognizable" under the FTCA, because "[b]y definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." 510 U.S. at 478. The Court observed that state law is "the source of substantive liability under the FTCA." Id. Defendant contends that "the gravamen of plaintiff's complaint" is that his Fifth Amendment right to equal protection was violated by the government and its agents. (Def.'s Mot. at 4).

Plaintiff, however, argues that his FTCA claims rests on California's negligence per se law, Cal. Evid. Code § 669(a)(1).[4] Plaintiff sets out a three-step analysis linking the government's liability to California state law: first, Jones, Henry, and Miller violated plaintiff's rights under 42 U.S.C. § 1985(3) by engaging in a racially motivated conspiracy against plaintiff; second, the United States violated § 1986 by failing to prevent the conspiracy under § 1985(3); and third, the § 1986 violation "constitutes negligence per se under California law," because the state law incorporates the duty that § 1986 imposes on private individuals.[5] (Pl.'s Opp'n at 7,

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[4] This section provides that

> [t]he failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute . . . was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute . . . was adopted.

Cal. Evid. Code § 669(a)(1)-(4) (West 1995).

[5] Section 1986 provides that

> [e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured.

10-11). Under this analysis by plaintiff, although this Court lacks jurisdiction for plaintiff's direct claim under § 1986, it has jurisdiction indirectly over § 1986 violations through California's negligence per se law.

Plaintiff's analysis, however, conflates two elements of tort law: duty and the standard of care. California's negligence per se law sets out the standard of review when an individual violates a statute, causing injury to a member of "the class of persons for whose protection" the statute was adopted. See Cal. Evid. Code § 669. However, a court cannot reach the standard of care without first establishing that a duty exists. See Ramirez v. Plough, Inc., 6 Cal. 4th 539, 25 Cal. Rptr. 2d 97 (1993) ("Once the existence of a legal duty is found, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform.") (quoting Rest. 2d Torts, § 328B, com. f.); see also Sierra-Bay Fed. Land Bank Ass'n v. Superior Court, 227 Cal. App. 3d 318, 335, 277 Cal. Rptr. 753 (1991) (distinguishing between a state negligence action adopting a federal standard of care and "a private cause of action for damages based upon the alleged violation of a federal statute").

In addition, as the Ninth Circuit has held, "[t]he breach of a duty created by federal law is not, by itself, actionable under the FTCA. To recover under the FTCA, [plaintiffs] must show the government's actions, if committed by a private party, would constitute a tort" in the state where the harm occurred. See Love v. United States, 60 F.3d 642, 644 (9th Cir. 1995). The duty in this case arises under federal law, i.e. § 1986, and "any duty that the United States owed to [plaintiff] cannot be founded on [a federal law]; its source must be [state] law." Lutz v. United States, 685 F.2d 1178, 1184 (9th Cir. 1982).

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42 U.S.C. § 1986 (West 1994).

The facts of Lutz are instructive on this point. In that case, plaintiff sued the United States under the FTCA after her daughter was injured when a neighbor's dog on an Air Force base wandered into their yard and attacked the little girl. Plaintiff claimed that the dog's owner, an Air Force enlisted man, "was acting within the scope of his employment when he negligently failed to control [his] dog." Id. at 1182. The Ninth Circuit agreed and then turned to the question of the United States' potential liability. Id. at 1183. Plaintiff argued that Base Regulation 125-5, requiring that animals be chained on the base, "impose[d] a duty on which liability may be based and also state[d] the standard of care" and that the owner's "violation of the regulation constituted negligence per se." Id. at 1183-84.

The Court rejected this theory of liability, holding that

> [t]he United States is liable for [plaintiff's] injuries only if a private person would be liable to her under the law of the place where the act or omission occurred. Even when the injury occurs on federal property, the finding of negligence must be based upon state law. Thus any duty that the United States owed to [plaintiff] cannot be founded on Base Regulation 125-5; its source must be Montana law. The federal statute or regulation under which the employee acted only becomes pertinent when a state law duty is found to exist. The federal statute or regulation may then provide the standard for reasonable care in exercising the state law duty.

Id. at 1184 (emphasis added) (citations omitted). The Court went on to find that a Montana statute established such a duty. Id.; see also Younger v. United States, 662 P.2d 580, 582 (1981) ("[I]n the instant case, the Government's liability [under FTCA] must be determined by considering the liability, under Washington state law, of a private landlord under similar circumstances."); United Scottish Ins. Co. v. United States, 614 F.2d 188, 193-94 (9th Cir. 1979) ("While

the existence of a federal statutory duty as the reason for undertaking the action will not automatically create liability [under FTCA], neither will such a duty preclude liability. The crucial inquiry is whether, in undertaking the inspection, a duty arose under state law because of the relationship thereby created–[in this case] the good samaritan rule.").

Other circuits have also recognized the principle that the duty element of a tort must rest on state law in order for a court to have jurisdiction under the FTCA. For example, the Fifth Circuit explicitly noted that "the FTCA requires that the duty breached by the government employees be not simply one imposed by federal statute or regulation, but rather arise under state law. . . . [this] requirement [is not] fulfilled by simply invoking the state's general negligence per se doctrine." Johnson v. Sawyer, 47 F.3d 716, 737 (5th Cir. 1995) (en banc). See also Myers v. United States, 17 F.3d 890, 899 (6th Cir. 1994) ("The doctrine of negligence per se was created, not as a means of deciding when a duty of care arises, but rather as a means of defining the particular standard of conduct such a duty requires."); Art-Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1158 (D.C. Cir. 1985) ("Duties set forth in federal law do not, therefore, automatically create duties cognizable under local tort law. The pertinent inquiry is whether the duties set forth in the federal law are analogous to those imposed under local tort law.") (emphasis in original); Sellfors v. United States, 697 F.2d 1362, 1365 (11th Cir.) ("The FTCA was not intended to redress breaches of federal statutory duties . . . ."), reh'g denied, 703 F.2d 582 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984); Davis v. United States, 395 F. Supp. 793, 795 (D. Neb. 1975), aff'd per curiam, 536 F.2d 758 (8th Cir. 1976) ("Unless the law of Nebraska would declare liability–including a duty–upon a private person in the same circumstances, no jurisdiction lies in this court.").[6]

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[6] Several courts appear to have taken an opposite approach, however. See Moody v. United States, 774 F.2d 150, 157 (6th Cir. 1985) ("[S]ince under

Although plaintiff argues that California's negligence per se statute incorporates § 1986, this duty is based in federal law and therefore is not actionable under the FTCA. Love, 60 F.3d at 644. Only state law, not federal law such as § 1986, can serve as "the source of substantive liability under the FTCA." Meyer, 510 U.S. at 478. Because California's negligence per se statute only creates a standard of review for tort law and does not create an independent state law duty,[7] this court lacks jurisdiction to hear plaintiff's claim.[8]

B. The Law of the Case

A federal court cannot act in a case without having subject matter jurisdiction. See Morongo Band of Indians v. Cal. St. Bd. of Equal., 858 F.2d 1376, 1380 (9th Cir. 1988) ("If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.'"), cert. denied, 488 U.S. 1006 (1989); see also Insurance Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 701 (1982). As seen above, this Court lacks jurisdiction to hear plaintiff's claim under the FTCA.

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Tennessee law [pursuant to the doctrine of negligence per se] a private individual could be held liable for violation of a federal regulation, the United States under the FTCA is exposed to similar liability."), cert. denied, 479 U.S. 814 (1986); Bergman v. United States, 565 F. Supp. 1353, 1395 (W.D. Mich. 1983) (holding that, by violating § 1986, the United States government was "therefore negligent per se under Alabama law"); Peck v. United States, 470 F. Supp. 1003, 1015 (S.D. N.Y. 1979) (observing that "there is a local law violation . . . because, in Alabama, the place where the act or omission occurred, violation of a statute, including the violation of a federal statute, designed to protect an individual from the harm suffered, is negligence per se") (citation omitted).

[7] Plaintiff fails to identify any other state statute that potentially creates a duty analogous to that found under § 1986.

[8] The Court need not reach defendant's arguments that its employees' conduct falls within the discretionary function exception to the FTCA. See 28 U.S.C. § 2680(a); see also United States v. Gaubert, 499 U.S. 315 (1991) (describing this exception). This Court also need not decide whether a genuine material facts exists as to plaintiff's underlying allegations of discriminatory conduct.

However, plaintiff contends that this issue has been previously litigated in this case. Plaintiff argues that Judge Kenyon's earlier orders, recognizing a cause of action under FTCA, is the "law of the case" and therefore should govern in later stages of the litigation.

Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent states in the same case." Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 816 (1988) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). The doctrine applies "as much to the decisions of a coordinate court in the same case as to a court's own decisions." Id. However, this rule is discretionary, in that "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance although as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.'" Id. at 817 (quoting Arizona, 460 U.S. at 618 n.8) (emphasis added); see also United States v. 1.33 Acres, 9 F.3d 70, 73 (9th Cir. 1993) ("'Law of the case' doctrine gives a court discretion to reconsider an issue previously decided."); United States v. Mills, 810 F.2d 907, 909 (9th Cir.) ("Law of the case is a discretionary doctrine."), cert. denied, 484 U.S. 832 (1987). In this case, several factors support revisiting the Court's earlier orders regarding jurisdiction.

In its May, 15, 1995, Order, Judge Kenyon stated that "it is California's negligence per se law that supplies the analogous state law claim required by the FTCA." (May 15, 1995, Order at 8). However, this approach inappropriately combines the duty element of tort with the standard of care by which the government's conduct is to be judged. California Evidence Code § 669(a) begins by stating that "[t]he failure of a person to exercise due care is presumed if" four certain factors are present; it does not establish what specific duty a person has. Section 1986, on the other hand, establishes

liability on any person who negligently fails to prevent violations of § 1985 over which he or she has some power to control. Allowing California's negligence per se to incorporate § 1986's duty would allow parties to do indirectly what they cannot do directly: to use § 1986 as the basis of a cause of action against the United States. Vincent v. Department of Health and Human Services, 600 F. Supp. 110, 111-12 (D. Nev. 1984), aff'd, 794 F.2d 683 (1986).

Further, the earlier opinions do not cite or discuss Ninth Circuit precedent such as Love v. United States and Lutz v. United States.[9] Love was decided on July 21, 1995, only three days before the Court denied defendant's motion to reconsider its earlier May 15th order. It is unlikely that Judge Kenyon or even the parties were aware of this decision. Cf. Heger v. Borg, 50 F.3d 1472, 1475 (9th Cir.) (intervening controlling authority is grounds to depart from law of the case), cert. denied, 116 S. Ct. 675 (1995). In addition, Judge Kenyon's earlier orders do not cite binding authority such as Lutz.[10] Therefore, this Court will not apply the law of the case doctrine to this lawsuit.

CONCLUSION

For the foregoing reasons, this Court GRANTS defendant's motion for summary judgment, as it lacks jurisdiction to hear plaintiff's remaining claim.

Date: April 16, 1998

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[9] The government did cite to Lutz, however, in its motion to reconsider. (See Defs.' Mot. To Reconsider at 5).

[10] In its order, the Court recognized that, under Scottish's holding, "the plaintiff must show that the government would have been liable for negligence had it been a private party charged under analogous state law; in so doing, the [Ninth Circuit] rejected 'the automatic application of state negligence per se law.'" (May 15, 1995, Order at 6 (quoting Scottish, 614 F.2d at 192)). However, there is no analogous state law in this case: California's negligence per se law is not "analogous" to the duties created under § 1986, nor does it create an independent state law duty.